

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In re:

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6 LEHMAN BROTHERS HOLDINGS

7 INC.,

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Case No. 08-13555(SCC)

9

Debtor.

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11 LEHMAN BROTHERS INC.

Adv. Case No. 08-01420(SCC)

12 - - - - - x

13 WONG, ET AL.,

14 Plaintiffs,

15

v.

Adv. Case No. 09-01120(SCC)

16 HSBC USA, INC., ET AL.,

17

18 Defendants.

19 - - - - - x

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1 LEHMAN BROTHERS HOLDINGS
2 INC. IN ITS CAPACITY AS
3 PLAN ADMINISTRATOR ON
4 BEHALF OF LEHMAN BROTHERS
5 SPECIAL FINANCING INC.,

6 Plaintiff,

7 v.

Adv. Case No. 13-01689(SCC)

8 LCOR ALEXANDRIA L.L.C.,

9 ET AL.,

10

11 Defendants.

12 - - - - - x

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15 U.S. Bankruptcy Court

16 One Bowling Green

17 New York, New York

18

19 August 4, 2015

20 10:03 AM

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23 B E F O R E :

24 HON SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: 08-13555 - Doc# 50217 Motion for Approval of
2 Settlement Agreement Among Putnam Structured Product CDO
3 2002-1 LTD., Putnam Structured Product CDO 2002-1 LLC, U.S.
4 Bank National Association, as Successor Trustee, Lehman
5 Brothers Special Financing Inc., and Lehman Brothers
6 Holdings Inc.

7
8 Hearing re: 08-13555 - Doc# 50296 Motion for Entry of an
9 Order Authorizing Lehman Brothers Special Financing Inc. to
10 Invest Disputed Claim Reserves for Claim Numbers 67733
11 Pursuant to Section 8.4 of the Modified Third Amended Joint
12 Chapter Plan of Lehman Brothers Holdings Inc. and its
13 Affiliated Debtors

14
15 Hearing re: 08-13555 - Doc# 50054 Motion for Objection to
16 Claim(s): The Plan Administrators Supplemental Objection to
17 the Four Hundred Thirty-First Omnibus Objection to Claims
18 (Reduce and Allow Claims)

19
20 Hearing re: Adv. 08-01420 - Doc# 12478 Trustees Motion for
21 an Order to (I) Establish a Third Interim Distribution Fund
22 for General Unsecured Creditor Claims, (II) Release Reserves
23 from the Secured and Priority Claim Reserve, the First
24 Interim Distribution Fund, and the Second Interim
25 Distribution Fund, and (III) Make a Third Interim

1 Distribution to Holders of Allowed General Unsecured
2 Creditor Claims with a Record Date of July 10, 2015

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4 Hearing re: Adv. 09-01120 - Status Conference

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6 Hearing re: Adv. 13-01689 - Motion to Amend Complaint

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25 Transcribed by: Dawn South and Sheila G. Orms

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1 P R O C E E D I N G S

2 THE COURT: Good morning, please have a seat.

3 Okay. Good morning, everyone. How are you?

4 MS. ARTHUR: Good morning, Your Honor. For the
5 record, Candace Arthur of Weil, Gotshal & Manges, on behalf
6 of Lehman Brothers Holdings Inc. as the plan administrator.

7 Your Honor, we filed an amended agenda letter
8 yesterday evening, and if it please the Court, I'll go in
9 the order of the items listed.

10 THE COURT: Absolutely.

11 MS. ARTHUR: The first item on the agenda before
12 the Court is the plan administrator's uncontested motion
13 pursuant to Bankruptcy Rule 9019 and Section 105(a) of the
14 Bankruptcy Code, seeking approval of a settlement agreement
15 amongst Lehman Brothers Special Financing Inc., Lehman
16 Brothers Holdings Inc., Putnam Structured Product CDO 2002-1
17 LLC, Putnam Structured Product CDO 2002-1 LTD., and U.S.
18 Bank National Association, in its capacity as successor
19 trustee.

20 Your Honor, we filed a motion on July 6th, it's
21 reflected on the docket as entry number 50217, and we filed
22 a declaration of Mr. Lawrence Branman (ph) in support of the
23 motion yesterday, and that's reflected on the docket as
24 50519.

25 In addition, Your Honor, the trustee has filed a

1 declaration in connection with the motion as well, and
2 that's on if docket as 50487.

3 Your Honor, both Mr. Branman and counsel for the
4 trustee are in the court today.

5 Your Honor, the settlement agreement is another
6 one of the resolutions we have been able to arrive at in
7 connection with the STB flip clause disputes.

8 Specifically with respect to this matter it
9 resolves the estate's claims against Alta (ph) CDO SPC and
10 the distributions that it made.

11 I would like to state on the record that the
12 amounts reflected in the motion in connection with the
13 distributions were incorrect, and the correct amounts are
14 set forth in Mr. Branman's declaration.

15 As Mr. Branman's declaration provides, the Alta
16 CDO SPC trustees distributed approximately \$410 million of
17 which the Putnam trust received approximately 42.5 million,
18 and it's the plan administrator's position that LBSF was due
19 and owing approximately 15.8 million. So the settlement
20 agreement does resolve the issues that we have with respect
21 to that transaction.

22 The plan administrator submits that the settlement
23 agreement was entered into after arms length negotiations
24 and is in the best interest of LBSF's estates and its
25 creditors.

1 There were no objections to the motion or the
2 settlement agreement, and subject to any questions that the
3 Court may have, the plan administrator respectfully requests
4 entry of an order approving the motion and approving the
5 settlement agreement as well.

6 THE COURT: All right. Thank you very much.

7 Does anyone wish to be heard with respect to the
8 plan administrator's motion for approval of a settlement
9 between LBSF and Putnam.

10 Good morning, how are you?

11 MR. TOP: Good morning, Your Honor, Frank Topp
12 from Chapman and Cutler on behalf of U.S. Bank National
13 Association.

14 And I just wanted to confirm for the Court's
15 record that not only were no objections filed in the
16 bankruptcy docket itself, but we have received no objections
17 from any noteholders or anything like that in connection
18 with this.

19 THE COURT: Excellent. Excellent.

20 MR. TOP: Thank you.

21 THE COURT: Thank you very much. All right, the
22 motion will be approved. Thank you.

23 MS. ARTHUR: Thank you, Your Honor.

24 The second matter on the agenda will be handled by
25 Mr. Susheel Kirpalani.

1 THE COURT: Okay. Good morning, Mr. Kirpalani.

2 MR. KIRPALANI: Good morning, Your Honor. For the
3 record Susheel Kirpalani from Quinn Emanuel on behalf of the
4 official committee of unsecured creditors of Lehman Brothers
5 and LBHI as plan administrator.

6 Judge, we're here this morning on the motion of
7 LBSF to invest a portion of the disputed claims reserve
8 pursuant to Section 8.4 of the plan. The notice and the
9 motion are docket 50295 and 50296, and they were filed on
10 July 14th, 2015. The objection deadline was July 28th,
11 2015. And we filed a notice of transaction documents along
12 with some exhibits on July 30th.

13 The exhibits are namely a filed form of the
14 intercompany note and security agreement that LBSF would
15 enter into with LBHI, as well as a deposit control agreement
16 in order to better secure LBSF in its security interests at
17 LBHI, and a revised form of order, which happily to report,
18 Your Honor, we reached after agreement and substantial
19 discussions with Citibank, who had expressed some concerns
20 to us prior to filing, and we wanted to try to work all of
21 those out, which we did.

22 All of the motion papers were served via ECF on
23 the dates that we filed them. And as noted in the letter to
24 Your Honor on July 31 there were no objections filed.

25 We filed a certificate of no objection yesterday

1 on August 3rd, and that's docket 50513.

2 Just to give the Court some context. Your Honor
3 may recall that the plan administrator filed a similar
4 motion corresponding with JPMorgan's derivatives claim
5 against LBSF, that was docket 40673 last summer,
6 August 22nd, 2014, and this Court entered an order on
7 September 10th of last year at docket 46276 granting that
8 relief. And so I just wanted to reorient the Court to why
9 are we doing these things, what does it actually accomplish?

10 It accomplishes two things.

11 First in situations that are unique like the
12 Citibank litigation they developed some trapped cash, it has
13 nothing to do with the merits of litigation, it's just a
14 matter of logic even more than amount, it's -- there's some
15 trapped cash, and the reason for that is LBSF, pursuant to
16 the plan, has to reserve the full amount of the maximum
17 potential claim and the distributions that would be payable
18 there.

19 So take Citibank's claims and LBSF are at most
20 \$1.599 billion. At LBSF's current distributions at 34 cents
21 on the dollar that's about \$543 million of cash that's just
22 sitting at LBSF earning next to nothing, and it can't go
23 anywhere. At the same time because of Citibank's unique
24 position with LBHI, as the Court knows it's hotly contested,
25 they have a deposit account at Citibank that LBHI claims

1 should be returned to LBHI, and Citibank claims it has a
2 setoff right with respect to that. So there's \$2.069
3 billion of cash at LBHI, it's actually at Citibank, but --
4 that belongs to LBHI, and there's the 543 million of LBSF
5 claims.

6 So this mechanism, which was born last year, which
7 we figured out a way to use here as well with Citibank's
8 consent, is to take the cash or at least the conservative
9 amount of cash that under all circumstances is going to be
10 sitting there somewhere, cash collateralized or however, and
11 move it out of the system, get it into creditors' pockets.
12 And it's going to move out from LBSF to LBHI for further
13 distribution to LBHI's creditors. So that's good for LBHI
14 creditors, because they get money, it's good for LBSF,
15 because the amount that LBSF is going to earn --

16 THE COURT: Right.

17 MR. KIRPALANI: -- on the amount invested in this
18 cash collateralized note will be 50 basis points higher than
19 what LBSF would otherwise be earning. So it's kind of a
20 win/win situation.

21 In last year's motion the amount invested was
22 \$560 million. This motion is requesting a similar
23 investment, but the amount is actually going to be
24 \$300 million initially, and it could go up by up to another
25 \$150 million, and that was a negotiated number with Citibank

1 going through a variety of mathematical scenarios and
2 doomsday scenarios, what could happen, and that was reached
3 conservatively comfortable. So the most it would be would
4 be 450 at some point.

5 Section 8.4 of the plan requires the establishment
6 of the reserves at each debtor, and as I mentioned, LBSF is
7 reserving about 34 cents on the dollar for disputed claims
8 in the maximum amount.

9 So this motion is again seeking to unlock a
10 portion using the most conservative and favorable
11 assumptions to the disputed claimants. And we talked to
12 Citibank before we filed the motion, after we filed the
13 motion, and ultimately reached resolution.

14 And just to be clear, this note is secured by two
15 things. It's secured by LBHI's deposit, so it's an amount
16 that LBHI owes to LBSF, \$300 million. What does it have to
17 back that up with? It's got the amounts that LBHI is owed
18 from Citibank on the deposit, and if Citibank is successful
19 in getting paid from LBHI through the deposit then LBHI will
20 subrogate and have a good claim against LBSF. So it's
21 basically round tripping in the money. So those are the two
22 sources of recovery.

23 William Montuoro is a senior vice president of
24 Lehman Brothers Holdings Inc., submitted a declaration. He
25 is here in court, Your Honor, the first row there, in case

1 anyone has questions.

2 THE COURT: All right.

3 MR. KIRPALANI: I would just like to proffer one
4 change to his testimony that's in his declaration.

5 THE COURT: Okay.

6 MR. KIRPALANI: In his declaration he talks about
7 the minimum amount mathematically and logically that LBHI
8 would be able to repay would be \$295 million, based on the
9 most conservative assumptions. That number has been moved
10 down to \$266 million. And the reason for that is in
11 discussions with Citibank the assumption under the initial
12 concept was let's say it takes five years to resolve the
13 litigation with Citi --

14 THE COURT: Let's not.

15 (Laughter)

16 MR. TOP: Very happy to hear that. Although
17 Citibank said just tacked on two more years to be safe. So
18 we tacked on two more years to make it seven years.

19 THE COURT: We're not getting a smile out of
20 Mr. Shimshak.

21 MR. TOP: So we tacked on two more years, again,
22 just in the interest of conservatism, and so now because
23 it's seven years potentially, including potentially post-
24 petition interest at LBHI, and because LBSF is just an
25 unsecured claim, and we'd never earn and never be paid post-

1 petition interest, so there's a negative arbitrage as the
2 Court is well aware. And so the most that -- the most
3 conservative place to be under the new chart that
4 Mr. Montuoro submitted -- or that we submitted with the
5 notice but that he would attest to, if asked to do so, is
6 266 million should be the new amount of the note, plus
7 34 million for the amount of legal fees that Citibank would
8 include in its proof of claim against LBSF.

9 As the Court knows Supreme Court Second Circuit
10 says just because you're an unsecured creditor doesn't mean
11 you have a -- don't have an unsecured claim for fees if your
12 contract permits it. So we tacked that on as well. Because
13 if LBHI is paying it you could subrogate to the valid
14 unsecured amounts. And so the new number is 300 million,
15 easy, round, and that's really all we have.

16 We do have copies of the new redlined order if you
17 want to walk through it or if you have it already, whatever
18 you'd prefer.

19 THE COURT: That's fine. That's fine. Why don't
20 I ask if anyone else wishes to be heard. Thank you very
21 much.

22 MR. KIRPALANI: Okay. Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. SHIMSHAK: Just very briefly, Your Honor.

25 Steve Shimshak, Paul, Weiss for Citi.

1 As Mr. Kirpalani's presentation indicated the
2 documents were heavily negotiated.

3 THE COURT: Okay.

4 MR. SHIMSHAK: There were significant enhancements
5 in contrast to what was originally offered to make us
6 comfortable with the arrangement, and the result is an
7 agreed order. So we're pleased to go forward.

8 THE COURT: All right.

9 MR. SHIMSHAK: Thank you.

10 THE COURT: Very good. Well notwithstanding the
11 fact that this is indeed an ongoing and hotly contested
12 litigation it's excellent that the parties were able to work
13 out this arrangement, which inures to the benefit of all
14 concerned. I'll approve the motion.

15 MR. KIRPALANI: Thank you very much.

16 THE COURT: Thank you very much. All right.
17 Thank you.

18 MR. KIRPALANI: Your Honor, may I be excused?

19 THE COURT: Yes.

20 MR. KIRPALANI: Okay. Thank you.

21 THE COURT: Thank you very much.

22 MR. SHIMSHAK: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MS. ARTHUR: Your Honor, the next matter on the
25 agenda with actually be Lehman Brothers Inc.

1 THE COURT: Okay. Thank you. Good morning.

2 MS. GRAGG: Good morning, Your Honor, Meaghan
3 Gragg with Hughes Hubbard & Reed, counsel for James W.
4 Gidden, the SIPA Trustee.

5 I'm here to address the trustee's motion for
6 authority to establish a third interim distribution fund of
7 approximately \$1.887 billion for purposes of making a third
8 interim distribution to allow unsecured general creditors
9 and release reserves from the secured and priority reserve
10 in the first and second interim distribution funds reserving
11 for remaining unresolved claims, and to authorize the
12 trustee to make the third interim distribution from the LBI
13 estate to allow general unsecured creditors with a record
14 date of July 10th, 2015, which would achieve a cumulative
15 35 percent interim distribution to LBI's unsecured general
16 creditors.

17 John Dunn, the declarant, in support of the motion
18 is here in the courtroom today.

19 Your Honor, I'm personally gratified and the
20 trustee is delighted that we're here before the Court today
21 seeking authority to make a third substantial distribution
22 to allowed unsecured creditors. This is a testament to the
23 effectiveness of the process laid out in SIPA and the
24 Bankruptcy Code as overseen by the Court and SIPC and the
25 collective efforts of the judges, court personnel,

1 regulators, and professionals who participated in that
2 process, including those working on behalf of creditors.

3 Over the past year largely as a result of
4 resolving remaining disputed claims the trustee has been
5 able to reduce reserves by \$805 million. As a result we are
6 now in a position with a sufficient pool of available cash
7 to significantly increase the distribution to general
8 creditors.

9 Should the order be entered the trustee
10 anticipates proceeding with the third interim distribution
11 in early September, increasing the total amount distributed
12 to LBI's general unsecured creditors to approximately
13 7.5 billion.

14 We continue to work towards the wind down of the
15 estate as soon as possible, but it is not likely that will
16 occur this year as we still have a number of significant
17 pending litigations before this Court and appellate courts.

18 Should the Court authorize the third distribution
19 significantly all estate assets will be dedicated to
20 litigation reserves or distribution funds, and any further
21 distribution from the LBI estate beyond the proposed third
22 interim distribution will be contingent on the reduction of
23 existing reserves as a result of successful litigation of
24 the disputed claims, which may not be until the conclusion
25 of the liquidation.

1 The relief the trustee now seeks, which is
2 detailed in the motion, is consistent with the relief
3 already granted by the Court in the severe and priority
4 reserve order and the first and second distribution orders.

5 All outstanding general creditor claimants were
6 served with the motion and schedules and had the opportunity
7 to be heard.

8 We have discussed the motion with certain
9 claimants who had questions about how the relief requested
10 in the motion might affect their claims and the reserves
11 established by the trustee's previous distribution motions.

12 The trustee did not receive any opposition to the
13 motion, only reservations of rights, which we believe are
14 unnecessary and inappropriate filed by three fully reserved
15 (indiscernible) claimants whose claims for bonuses are
16 subject to litigation pending before this Court.

17 The trustee contacted the claimants' attorneys to
18 see if they would withdraw, I don't believe they're in the
19 courtroom today.

20 THE COURT: So are any of the counsel for the
21 three claimants who filed reservations of rights present
22 here today? They did not communicate to you that they were
23 withdrawing their reservations of rights?

24 MS. GRAGG: No, they did not.

25 THE COURT: My understanding is that consistent

1 with what you've represented that their claim amounts are
2 indeed fully reserved at the full amounts that they're
3 asserting.

4 MS. GRAGG: Yes, Your Honor.

5 THE COURT: So therefore the reservation of rights
6 is what it is and their rights are fully reserved. All
7 right.

8 MS. GRAGG: Entering this order will benefit
9 creditors, it's supported by SIPC, it's supported by major
10 creditors of the estate, and if you're has any questions I'm
11 here to answer them.

12 THE COURT: All right. Thank you very much.

13 Does anyone else wish to be heard with respect to
14 the trustee's motion for authority to make an additional
15 interim distribution?

16 I think it's important, as I have done in the
17 past, to pause and reflect on this accomplishment. I think
18 I said it the last time you were before me seeking to make
19 the last interim distribution, but I very strongly believe
20 that it cannot be said enough.

21 To go back to September of 2008 folks believed
22 that customer claims would not be fully paid. So not only
23 have customer claims been fully paid, but we are now at 35
24 cents on the dollar, which those of us who work in the
25 bankruptcy arena know may not sound great to somebody who

1 would like to have 100 cents, but it's an extraordinary
2 accomplishment in most any case, and it's an incredibly
3 extraordinary accomplishment in this case.

4 The other side of that coin is the tremendous
5 amount of work that it takes to get there, and often one
6 reads criticism at the level of professional fees that are
7 expended in order to wind down, liquidate, fulfill the
8 mission of the trustee and this estate.

9 In reviewing the fee applications and in seeing
10 you folks come in here week in and week out and seeing the
11 level of effort that it takes to resolve even what appears
12 to be the most simple claim in terms of the forensic
13 accounting that's involved, the sophisticated financial
14 securities issues, all the way down to what we would think
15 of as ordinary contract disputes, which each have a very
16 real human element that has to be dealt with, because after
17 all there are people on the other end of a lot of these
18 claims, I think that all concerned deserve a tremendous
19 amount of congratulations.

20 Certainly from the Court's perspective as we
21 continue to operate in a time of budgetary constraints we
22 try our best to keep up with you, because every day that we
23 might have to delay, which I don't believe we do delay very
24 often, means another day that distributions don't get into
25 the hands of creditors who have been waiting all these

1 years.

2 So, I'm very happy to approve the motion. My
3 congratulations to everyone who's working. Keep at it, and
4 I'm hoping that the number will go even higher before we're
5 done. Thank you very much.

6 MS. GRAGG: Thank you, Your Honor.

7 UNIDENTIFIED SPEAKER: Can we be excused, Your
8 Honor?

9 THE COURT: Yes. Thank you.

10 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

11 THE COURT: Thank you.

12 UNIDENTIFIED SPEAKER: May I approach with the
13 order?

14 THE COURT: Yes. Good morning, Ms. Marcus.

15 MS. MARCUS: Good morning, Your Honor. Jacqueline
16 Marcus, Weil, Gotshal & Manges on behalf of Lehman Brothers
17 Holdings Inc. as plan administrator on behalf of BNC
18 Mortgage LLC.

19 Item number 4 on the agenda, Your Honor, is the
20 plan administrator's supplemental objection to the four
21 hundred thirty-first omnibus objection to claims, ECF number
22 50054.

23 This claim objection relates to the proofs of
24 claim filed by six former employees of debtor BNC.

25 The last time we were before you with respect to

1 these claims was in October 2014 in response to the
2 claimants' motion for relief from the automatic stay to
3 continue their litigation against BNC in the California
4 state court. The Court denied that motion.

5 Before engaging in further litigation regarding
6 the claims the parties tried for the third time to resolve
7 these claims through mediation. The third mediation took
8 place in April of this year. Representatives of the plan
9 administrator, BNC's insurance company, and the claimants
10 attended, and again the parties failed to reach a
11 resolution.

12 The plan --

13 THE COURT: So can I ask you to pause --

14 MS. MARCUS: Sure.

15 THE COURT: -- and I'd like to know a little bit
16 more about the role of insurance here and also the claims
17 pools at BNC and what the projected distributions are.

18 Excuse me, sir, yes?

19 MR. GWILLIAM: Your Honor --

20 THE COURT: No, Ms. Marcus is at the podium, I'd
21 like to speak to her for right now. Thank you very much.

22 MS. MARCUS: Okay. So let's start with the role
23 of the insurance company. Excuse me.

24 As we determined at the state hearing in October
25 there is a retention, a \$5 million retention which has not

1 nearly been approached yet. At that time I think the number
2 that we used was \$795,000 in all Lehman legal fees. And
3 while we have incurred expenses since then, obviously we're
4 not anywhere near \$5 million yet.

5 So the insurance company has taken the position so
6 far that it's not required to -- I don't know if they've
7 officially said they're not required to defend -- but we
8 haven't exceeded the retention yet.

9 Nevertheless we did persuade them to attend the
10 mediation, and we believe that if we had been able to come
11 up with a reasonable number that they might have contributed
12 to the settlement at that time, notwithstanding the fact --

13 THE COURT: Okay.

14 MS. MARCUS: -- we haven't exceeded the insured
15 retention.

16 With respect to the level of claims at BNC there
17 are perhaps a handful of claims with one big exception other
18 than the claims of these six plaintiffs, and depending on
19 what happens with the RNBS trustee claim, that's the big
20 exception, the RNBS trustee claim as you know is being
21 resolved through the claims protocol that the Court
22 approved, that claim was filed against BNC as well as many
23 of the other debtors. So that claim is the one that
24 threatens to really --

25 THE COURT: Swamp the pool.

1 MS. MARCUS: Swamp is a good word. Swamp all the
2 creditors.

3 BNC has on hand approximately \$16 million. If the
4 claims of these six claimants were allowed at 35 million
5 they wouldn't be able to pay all creditors in full.
6 Depending on what happens to the RNBS claim there might or
7 might not be sufficient funds to make a substantial
8 distribution to BNC's creditors.

9 THE COURT: Okay. All right. I interrupted you,
10 I'm sorry.

11 MS. MARCUS: Okay. No problem.

12 The plan administrator filed a supplemental
13 objection, and as reflected in the agenda, the claimants
14 have filed a supplemental response and the plan
15 administrator has filed a reply.

16 There are a few salient facts that I believe are
17 undisputed that I'd like to just remind the Court of before
18 we delve into the merits.

19 Claimants collectively have filed proofs of claims
20 in the aggregate amount of \$35 million, which claims do
21 include punitive damages.

22 Seven years prior to the commencement of BNC's
23 Chapter 11 case, in November of 2005, the claimants resigned
24 from BNC and commenced an action in state court in
25 Sacramento asserting a variety of claims.

1 BNC ceased its operations in October 2007, more
2 than a year before the commencement of its Chapter 11 case.

3 BNC's estate has approximately \$15 million of
4 cash, and we've already talked about the insured retention.

5 As the Court is aware under the ADR claims
6 procedure the first hearing with respect to any claim
7 objection is called a sufficiency hearing. I believe the
8 parties are also in agreement that the standard to be
9 applied in this hearing is the same standard applied for a
10 Rule 10(b)(6) motion.

11 THE COURT: 12(b)(6).

12 MS. MARCUS: I'm sorry, 12(b)(6).

13 THE COURT: You've got your 10(b)(5) and your
14 12(b)(6) mixed up.

15 MS. MARCUS: Yep, yep. Thank you, Your Honor.

16 The plan administrator takes issues with many of
17 the six claims -- many facts asserted in the six claims, but
18 many of those issues are factual disputes that would not be
19 appropriate for resolution here today.

20 The supplemental objection was filed really in
21 order to set forth a method -- excuse me -- matters that the
22 Court can determine as a matter of law. The plan
23 administrator had two goals in mind.

24 First, by limiting the issues we believe that we
25 would narrow the issues for discovery and save both the

1 estate's and the claimants' money as we proceed with the
2 claims litigation.

3 And second, we were hoping that the preliminary
4 holding -- the preliminary rulings would alter the
5 expectation of the claimants thereby making settlement
6 through a mediation or otherwise more likely.

7 With this in mind the plan administrator concluded
8 that there are three threshold areas that the Court can rule
9 on as a matter of law. Two of them are issues of California
10 law, and with the Court's permission will be handled by
11 Nathan Jaskowiak from Keesal, Young & Logan, BNC's
12 California counsel. Mr. Jaskowiak's pro hac vice motion has
13 already been granted by the Court.

14 He will speak to whether the proofs of claim have
15 established a claim for defamation under California law, and
16 whether under California law claimants can assert a claim
17 for loss of income after October 2007 when BNC closed its
18 doors.

19 The third issue is a matter of bankruptcy law, and
20 that is the extent to which the Court should allow any claim
21 for punitive damages against BNC.

22 Unless the Court prefers otherwise I'll address
23 those issues after Mr. Jaskowiak has said his piece.

24 THE COURT: Okay. That will be fine. Thank you
25 very much.

1 MS. MARCUS: Thank you.

2 MR. JASKOWIAK: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. JASKOWIAK: Nathan Jaskowiak, Keesal, Young &
5 Logan on behalf of Lehman Brothers Holdings Inc. as plan
6 administrator on behalf of debtor BNC Mortgage LLC.

7 So, I wanted to address two of the three issues
8 that Ms. Marcus has put --

9 THE COURT: Right. So let's talk about
10 defamation.

11 MR. JASKOWIAK: Okay.

12 THE COURT: All right? So the claimants respond
13 to the plan administrator's objection by saying -- I'm at
14 page 6 of the response. It says, "Instead debtor only
15 quotes a portion of the allegations. Debtor has left out
16 the defamatory statement this is what was actually pled."
17 And then there's a reference to paragraph 147 of the
18 complaint, which says that -- and the bold is -- the
19 emphasis is added by the claimants, "Published false
20 information to others, disparaging plaintiffs," et cetera,
21 et cetera, and one claimant's work performance and
22 abilities.

23 So your position is that that's wholly conclusory.
24 And my question for you is, under California law is what is
25 required literally an allegation of the statement?

1 MR. JASKOWIAK: I don't -- I think California law
2 you don't have to say it verbatim, but you have to
3 specifically identify it. So something like this is far too
4 general just saying work performance and abilities, which is
5 really just a subject area, you would have to identify --

6 THE COURT: The person says you're a terrible
7 worker, you're lazy.

8 MR. JASKOWIAK: Right. Exactly.

9 THE COURT: Something like that.

10 MR. JASKOWIAK: The statement. And then if
11 there's multiple statements identify each of them. I don't
12 think you have to say -- you know, put them in quotes or
13 anything, but you do have to identify each statement. And
14 it's our position that this is just far too general under
15 California law. We're probably the law of almost any other
16 state.

17 THE COURT: Okay.

18 MR. JASKOWIAK: And then with respect to -- they
19 requested leave to amend, and with respect to that there's
20 two points that we make in our reply brief, and one of them
21 is that California law has a qualified privilege through
22 employers to make statements concerning the work performance
23 of its employees, and then also that such statements would
24 be statements of opinion and not statements of fact, and
25 only a statement of fact can form the basis of a defamation

1 claim.

2 So it's our position that leave to amend wouldn't
3 be able to cure either of those issues, and in any event,
4 they haven't given an offer of what they would even amend to
5 state.

6 So it's our position that these statements are far
7 too general and that leave to amend should be denied in any
8 event because there's -- it would be futile.

9 THE COURT: Okay. All right. So that takes care
10 of defamation.

11 With respect to the loss of income, and we can
12 talk to counsel for the claimants about this as well, it's
13 undisputed that BNC closed in 2007, and it seems undisputed
14 also that lost wages, vis-à-vis, BNC stops when BNC stops.
15 But what seems to be -- and I searched the complaint, which
16 is attached to the proof of claim, to try to get some
17 clarity around this -- because there seems to be some notion
18 that what's really being claimed is -- well the spin, if you
19 will, is a reduced earnings capacity, but then when I go
20 back into the complaint I have a hard time finding that. So
21 is that --

22 MR. JASKOWIAK: I think that's right.

23 THE COURT: Do you disagree that there would be a
24 claim for reduced earnings capacity?

25 MR. JASKOWIAK: I think that that's something that

1 they would have needed to allege, and here they're really
2 seeking damages for back pay, front pay, and those are the
3 economic damages that they're seeking. They don't make a
4 claim that they've been unable to work or that they --

5 THE COURT: Right. So the front pay stops in 2007
6 when the doors closed in terms of BNC, right?

7 MR. JASKOWIAK: Right. And I guess it would all
8 be back pay since we're not at a point where we have a
9 judgment.

10 THE COURT: Right.

11 MR. JASKOWIAK: But yes, either of them would stop
12 when the doors close, I think that's undisputed.

13 THE COURT: Okay. All right.

14 MR. JASKOWIAK: But I mean, I think, Your Honor,
15 you're exactly right, they don't make an allegation. I
16 think it's a purely manufactured claim to try to deal with
17 the fact that BNC is closed and that their economic damages
18 would be cut off, and it's our position that this lost
19 earnings capacity is not a claim that's recognized in
20 California.

21 They cited the California jury instruction, and it
22 instructs jurors to calculate how long would they have
23 worked at the employer, and to take into account how long
24 they expected the employer would have continued operations.
25 Well we know that, we know how long it continued operations,

1 and that's the cut off for lost wages.

2 One additional point is that they all found jobs,
3 so I don't think Mr. Gwilliam is going to dispute that, but
4 they did all find jobs.

5 So it's really our position that this is just a
6 way to inflate their economic damages claim.

7 THE COURT: Okay. All right.

8 MR. JASKOWIAK: Oh, Your Honor, I'm sorry, I had
9 one additional issue.

10 I'm not sure if you need me to address it or not,
11 but they had made a claim that we had already filed our
12 answer in the state court, a case about eight years ago, and
13 that we couldn't bring a motion to -- or --

14 THE COURT: That's --

15 MR. JASKOWIAK: Okay.

16 THE COURT: Right. That's -- we're in a different
17 process now.

18 MR. JASKOWIAK: Okay.

19 THE COURT: And we'll get to that a little bit
20 more later. Sir?

21 MR. GWILLIAM: Thank you, Your Honor. Again, Your
22 Honor, I'm Gary Gwilliam, attorney for all of the plaintiffs
23 in this matter, and it's nice to appear before you.

24 THE COURT: Okay.

25 MR. GWILLIAM: And I came out from California.

1 THE COURT: Welcome.

2 MR. GWILLIAM: Thank you.

3 So I'd like to at this point, Your Honor, just to
4 address the two issues that are before us and then we can
5 talk a little more generally about some of the issues that
6 Ms. Marcus brought up.

7 I would point out, Your Honor, that this is an
8 interesting objection. It is a 12(b)(6) objection based
9 upon the pleadings only of a complaint that was filed in
10 2005. So we're dealing, as I understand it, with the
11 sufficiency of a complaint under California law. I think we
12 all agree to that. And that's --

13 THE COURT: Okay. Well not so fast.

14 MR. GWILLIAM: Okay.

15 THE COURT: Not so fast. You filed the complaint
16 in California.

17 MR. GWILLIAM: Correct.

18 THE COURT: But most significantly you filed
19 proofs of claim in this bankruptcy case.

20 MR. GWILLIAM: We did.

21 THE COURT: So once you filed a proof of claim in
22 this bankruptcy case, to which you attach to complaint in
23 California, that's the basis of your claim.

24 MR. GWILLIAM: Well that's part of it.

25 THE COURT: Well when -- the way the claims

1 process works is you have to -- you file a proof of claim,
2 and I'm holding a claim here of Ms. Seymour (ph), and it
3 says basis for claim damages for wrongful termination, et
4 cetera, per attached complaint.

5 MR. GWILLIAM: Right.

6 THE COURT: So that --

7 MR. GWILLIAM: But I believe she attached a
8 declaration also, but I don't -- I haven't looked at that
9 recently. But that's true, we're looking at the sufficiency
10 of the claim.

11 THE COURT: Well we're looking at the sufficiency
12 of the claim. So there's a claims process here and the
13 basis of your claim is the complaint.

14 The procedures that are in place now and that have
15 been in place for years in this case are in order to
16 facilitate the review of these claims there is a -- what we
17 -- what's come to be called a sufficiency hearing, which
18 everybody agrees is just like a 12(b)(6), whether or not
19 there's enough alleged that gets you out of the starting
20 gate.

21 MR. GWILLIAM: Right.

22 THE COURT: So, I just want to somewhat correct
23 your perspective that the way that you're looking at it I'm
24 somehow redoing something that was done in California.

25 This is a claims process that unfolds here now

1 until something else happens, which we can talk about later.

2 MR. GWILLIAM: Well, I totally understand that,
3 Your Honor.

4 THE COURT: Okay.

5 MR. GWILLIAM: But I believe under 12(b)(6), as
6 under California law, we're looking at the sufficiency --

7 THE COURT: Yes.

8 MR. GWILLIAM: -- of the pleading. And under
9 sufficiency of pleading laws if we have not pled something
10 appropriately on a complaint that was filed ten years ago we
11 have leave to amend, and oftentimes leave to engage in
12 discovery, if need be, in order to allow us to amend the --

13 THE COURT: Alter as a general matter.

14 MR. GWILLIAM: Right.

15 THE COURT: Okay.

16 MR. GWILLIAM: So given that context, so example,
17 on the defamation claim we filed what I believe is
18 sufficient pleading to put them on notice of what our plan
19 was. If there is more detail that needs to be gone into I
20 would remind the Court that there was almost no discovery,
21 certainly no discovery of any of the defendants.

22 THE COURT: Here's the issue that I have, is that
23 the particular portion that we're focuses on --

24 MR. GWILLIAM: Right.

25 THE COURT: -- is your allegation of what was said

1 to the claimants --

2 MR. GWILLIAM: Correct.

3 THE COURT: -- right? There's no discovery
4 required with respect to that. They heard -- they --
5 presumably behind your complaint is knowledge of what was
6 said.

7 MR. GWILLIAM: No.

8 THE COURT: No.

9 MR. GWILLIAM: No, because there could be other
10 people that it was published to that the plaintiffs did not
11 hear about. So defamation does not require that the
12 plaintiffs themselves hear all the claims of defamation. If
13 they are making other claims to other people out there that
14 are defamatory, that are causing them loss of reputation and
15 injury, that may be defamation even though the plaintiff
16 didn't directly hear it. So --

17 THE COURT: Well let me try to understand your
18 position --

19 MR. GWILLIAM: Right.

20 THE COURT: -- because this is different from what
21 you stated in your pleadings. In your pleadings you stated
22 that under California law the defamatory statement is that
23 there were statements that were made about work performance
24 and abilities and that there was false information
25 disparaging the plaintiffs.

1 MR. GWILLIAM: Right. But that doesn't require
2 that each plaintiff hear that.

3 THE COURT: Okay.

4 MR. GWILLIAM: So that's why discovery or further
5 information is oftentimes --

6 THE COURT: But how did you know enough to file
7 this complaint?

8 MR. GWILLIAM: Well, I'm sure that they heard it
9 maybe secondhand and some comments were made to them.

10 THE COURT: Okay. And what I'm saying to you is
11 that at a minimum I would expect to see, if not verbatim in
12 more detail, what it is that they heard, otherwise it's
13 impossible to say someone has defamed me. Presumably what
14 you're telling me is they heard, others told them that one
15 of the individual defendants said X, Y, or Z about them. We
16 don't have anything like that here.

17 MR. GWILLIAM: Well we have the allegation that
18 the Court just referred to in our complaint that they did
19 not mention in theirs, that named specifically the
20 defendants, Linda Harris, Nick Murphy recklessly published
21 false information disparaging the plaintiffs Colombo, et
22 cetera --

23 THE COURT: My point is --

24 MR. GWILLIAM: -- on information and belief.

25 THE COURT: Okay. My point is that if someone

1 said -- if they heard something you have not even put in
2 what they heard.

3 MR. GWILLIAM: Well typically under a California
4 pleading we don't have to do that, it's a liberal pleading,
5 and that's the whole --

6 THE COURT: So is your idea that then you would
7 get to trial and then only at that point would there be a
8 revelation of what was said?

9 MR. GWILLIAM: No. I believe that under
10 California law, under 12(b)(6), and under the Demurrer
11 motion to strike if in fact they believe that this is not
12 sufficient they can file a Demurrer for uncertainty and then
13 we can have a second hearing.

14 THE COURT: We're not in California law anymore.

15 MR. GWILLIAM: Right.

16 THE COURT: This is a federal court, I'm in the
17 federal rules of civil procedure, and the case management
18 order of this case. So, I'm not -- I hear you.

19 MR. GWILLIAM: Okay.

20 THE COURT: It's the same concept, but you're --
21 you are unable to tell me what it is that was said or was
22 heard, and I am having a hard time understanding how
23 consistent with Rule 11 you would be able to file a pleading
24 without having knowledge of what you believe was said, the
25 very words. I'm struggling with that.

1 MR. GWILLIAM: Well if in fact you needed more
2 information that's the whole purpose of being allowed to
3 amend the complaint in order to give you more. I'd have to
4 sit down and talk about what was said many years ago and go
5 through it.

6 THE COURT: But --

7 MR. GWILLIAM: But this pleading --

8 THE COURT: -- let's just -- I'm going to keep
9 with -- keep with me in the moment. We're back in 2005 and
10 these individuals leave BNC --

11 MR. GWILLIAM: Right.

12 THE COURT: -- because you say something happened.
13 Well what happened was, you say, people said bad things
14 about them. What? They -- when they came to you -- and I'm
15 not asking you to violate attorney/client privilege -- they
16 had to be a factual predicate for embarking on this lawsuit,
17 and it's common sense purely to believe that that involved
18 being told what was said.

19 MR. GWILLIAM: Well we allege that Joe Penick (ph)
20 and Nick Murphy and Linda Harris made disparaging comments
21 about their work performance in the billings. That is
22 indeed a general allegation as is typically done. If more
23 information is needed then the complaint can be amended.
24 But we operated under this complaint for two years, plus --
25 and never got into it.

1 So if you wanted me to say I want to know exactly
2 what was said then that's the whole purpose of having a
3 motion to amend.

4 THE COURT: But if you're telling me right now
5 that your clients, if the question is put to them squarely,
6 what was said about you they would say that -- they would
7 simply say disparaging things. They would not be able to
8 say specifically I was called a name, I was characterized as
9 this, that, or the other thing.

10 MR. GWILLIAM: No, I think -- you know, I'd have
11 to go back and talk to them about what was said about that.
12 The interest -- no, I think that there was much more
13 specific said. But again --

14 THE COURT: But then why haven't you pled that?

15 MR. GWILLIAM: Because it doesn't require -- the
16 pleadings do not require in California or under the
17 pleadings law to do anything more than this is a sufficient
18 pleading. If it's insufficient we have a right to amend and
19 then we can bring those things in.

20 Secondly, all the information, particularly in the
21 defamation case, doesn't come strictly from the plaintiff,
22 and that's why oftentimes the court will allow us to move
23 forward towards (indiscernible). Now --

24 THE COURT: I totally hear you, but you still --
25 there's no good answer to the issue that in the first

1 instance you have -- you're representing folks who say that
2 this occurred and yet they cannot give any quotes or
3 approximate quotes or anything more specific. Under the law
4 general statements that --

5 MR. GWILLIAM: Your Honor, with all due respect I
6 entirely disagree with that. You're saying they quote
7 cannot do that. They did not because they were not required
8 to under the California law pleadings that they filed in
9 November of 2005. They filed an adequate complaint that was
10 worked on there. If there's more detail that is needed then
11 that's the whole purpose of their right to amend.

12 Now oftentimes in cases like this the final motion
13 is on motion for summary judgment. That's where these
14 issues are fleshed out, not at the pleading level, because
15 at the pleading level, particularly on defamation, they
16 oftentimes don't know everything that was defamed about
17 them.

18 So the whole point of allowing us to have general
19 pleadings and then at some stage later the Court will hear
20 this.

21 Now when we were here on October 7th, and I read
22 the entire transcript again, you talked about how at some
23 stage you would have to hear dispositive motions. I do not
24 see this as a dispositive motion.

25 THE COURT: If that's what the transcript says

1 then it was an error. I think the context there was your
2 belief that you were ultimately going to try this case back
3 in California, and I was trying to clarify for you the fact
4 that you're part of a claims process here and until I rule
5 otherwise the claims get resolved here.

6 MR. GWILLIAM: Right.

7 THE COURT: And I might have eluded to the fact
8 that if nothing else, no matter where it all shakes out, I'm
9 not going to identify issues before the parties do, that
10 oftentimes there could be dispositive motions here.

11 I quite agree with you this doesn't feel like a
12 dispositives motions case. What this feels like is a case
13 that ought to be settled.

14 MR. GWILLIAM: I couldn't agree with you more.

15 So let's just step back for a minute if you don't
16 mind --

17 THE COURT: Sure.

18 MR. GWILLIAM: -- and let me address some of the
19 issues that Ms. Marcus addressed --

20 THE COURT: Okay.

21 MR. GWILLIAM: -- because first of all with all
22 due respect I want this case settled, we've tried to have
23 this --

24 THE COURT: You don't have to say with all due
25 respect, okay? I will assume that you are affording me due

1 respect.

2 MR. GWILLIAM: I'm an old fashion lawyer and I
3 speak that way.

4 THE COURT: Okay.

5 MR. GWILLIAM: I don't mean any disrespect.
6 That's a term that I -

7 THE COURT: Very good. It's a habit.

8 MR. GWILLIAM: Maybe a bad habit.

9 THE COURT: Okay.

10 MR. GWILLIAM: But, all right.

11 Your Honor, we fully want this case settled. I do
12 not honestly believe that the issues on these objections, on
13 all three of these issues are the variances to the
14 settlement. I've been involved in every aspect of this.
15 The variance to the settlement are back on what we call
16 these other claims, and that's been the issue that we've had
17 to deal with.

18 Now these RNBS claims something important has
19 happened since we were here on October 7th, 2014. This
20 Court has now entered a detailed chronicle order for all of
21 those mortgages, claims against Lehman, BNC, and others, to
22 be very carefully gone through, litigated, claimed, and as I
23 understand it you had a hearing here not too long ago where
24 they talked about like it would be 50 percent of them going
25 out. So, I think that that's been --

1 THE COURT: That's a little bit of a
2 mischaracterization. Of the ones that had already been
3 submitted that had already been reviewed 50 percent didn't
4 make it through, but --

5 MR. GWILLIAM: It just strikes me that when we
6 look at these RNBS claims with the protocol that the Court
7 set that's a tough barrier to find mortgages that are eight
8 or ten years old that you could prove fraud, cause, damage
9 all this time later, and it'll be interesting to see how all
10 of that flows out.

11 THE COURT: I'll be very interested to see.

12 MR. GWILLIAM: Well, I will too, because it
13 affects us to a certain extent.

14 But -- so I -- but what we come back to, Your
15 Honor, that concerns me, and this is a point I really wanted
16 to hit to have you be aware of. There is \$16 million
17 sitting in this BNC trust fund available for distribution.
18 My understanding is that there are no other significant
19 claims other than the possibility of the RNBS claims against
20 BNC other than ours. But in our claim it was in the face
21 value of \$35 million, could be settled within the
22 \$16 million amount.

23 But what concerns me, Your Honor, is that
24 originally they put \$5 million towards equity, now in
25 addition to the \$16 million --

1 THE COURT: Wait, what's the \$5 million towards
2 equity?

3 MR. GWILLIAM: That was towards equity to the
4 shareholders of BNC. Now it's up to \$10 million.

5 THE COURT: I don't know what you're referring to,
6 sir.

7 MR. GWILLIAM: There is a bank -- there's a profit
8 and loss statement of BNC that indicates \$16 million is
9 available. In addition to the \$16 million they've allocated
10 \$10 million towards equity to the shareholders. That
11 concerns me that money would go to the shareholder equity
12 before the claims are paid. So --

13 THE COURT: We'll have to ask Ms. Marcus if she
14 can address what you're talking about, because I don't know.
15 The only way that the equity, which would be big Lehman,
16 right, the only way that there would be a recovery there,
17 which has happened from time to time, is if all unsecured
18 creditors at BNC are paid in full.

19 MR. GWILLIAM: Totally agree.

20 THE COURT: That's the way it works. So --

21 MR. GWILLIAM: So, I think this becomes important,
22 because, for example, when we get to the punitive damages
23 one of the issues is are we going to possibly dilute other
24 claims by a claim of punitive damages, and if there's plenty
25 of money available to pay us off entirely, and if it doesn't

1 look like there's going to be other claims that are there I
2 don't think that that's a major issue. But maybe we cross
3 that bridge when we get there. But I don't -- I honestly
4 don't feel that this objection hearing is taking us very far
5 forward.

6 When we were here on October 7th the Court may
7 remember that one of the issues that we talked about was if
8 we're going to get involved in discovery, and you wanted to
9 move this case along expeditiously, you made that very clear
10 and I know that's been your process in all these claims, the
11 expectation that I had is that we would move forward with
12 discovery. You said specifically, and you asked Ms. Marcus
13 to agree, that we could start discovery in California, and
14 I'm pleased to see that we have a California lawyer here
15 from a very fine firm that can engage in discovery, but not
16 one bit of discovery has been done since we were here on
17 October 7th.

18 Now true we did have another mediation. When I
19 asked that discovery get started and I said let's take the
20 depositions of the plaintiffs, ask them questions about the
21 defamation, ask them questions about their loss of earnings
22 and loss of earning capacity, let's do that. Only one
23 plaintiffs' deposition was every taken years ago. The
24 answer was --

25 THE COURT: Well that gets to -- the lost earnings

1 piece gets to the other thing that we need some
2 clarification around, because it is undisputed that BNC
3 closed in 2005. It is undisputed you cannot make a claim
4 for lost wages payable by BNC after the time that BNC
5 closed.

6 MR. GWILLIAM: And I don't think that's the law in
7 California and I think it is disputed that we can make a
8 claim for that because of the loss of earning capacity.

9 THE COURT: Well, no, no, no, no. No, let's be
10 very precise. The loss of earning capacity is a different
11 beast entirely. The loss of earnings at BNC stops if there
12 is an entitlement at the moment that BNC closed its doors.

13 I went back and I read the complaint, I do not see
14 an allegation of diminished earning capacity. And then
15 based on what I've been advised by counsel in this hearing
16 there would appear to be the impediment to that claim.

17 Again, I don't know what the facts are, I only
18 know what I'm being told, but to the extent that the
19 claimants obtained employment then that is a factor that
20 would go into an allegation -- the merit of an allegation of
21 diminished earning capacity if an individual is terminated.

22 Putting to one side questions about emotional
23 distress, intentional infliction of emotional distress, and
24 all of that, simply economic damages. If the individual
25 were able a month later to obtain a job at a salary similar

1 to what she earned previously there is no economic damage.

2 MR. GWILLIAM: No, what concerns me and what
3 concerns me about Mr. Jaskowiak's comment was that he's told
4 this Court that they had gotten jobs. That's not true.
5 Some did and some didn't, but why are we talking about what
6 happened factually if we're still dealing with the pleading
7 issue?

8 THE COURT: I think the reason that we're talking
9 about what happened factually -- and maybe the thing to do
10 is to pause after this exchange.

11 What Ms. Marcus explained, which is consistent
12 with what we do routinely with all of these claims, is to
13 find ways to make the process -- to right size the process.
14 And the plan administrator, you disagree, but the plan
15 administrator is explaining a view that this claim -- the
16 parameters of this claim are too large and that therefore if
17 the parameters of the claim were right sized that might
18 facilitate settlement, because there is funding there, the
19 exact distribution to dividend will be uncertain, what is
20 certain is that not a penny leaves until all unsecured
21 creditors are paid in full for their allowed amounts.

22 The existence of the punitive damages claim, and
23 I'm not -- I'm disinclined to offer an advisory -- issue an
24 advisory opinion, but I will tell you -- this proof of claim
25 is filed here, this is a submission to the equitable

1 jurisdiction of the Court. Okay? It's highly unlikely that
2 punitive damages would be allowed as an allowed claim in
3 this court. Not to say hypothetically before a jury you
4 wouldn't be able to get them, but in terms of allowing in
5 the bankruptcy sense a claim for punitive damages highly
6 unlikely.

7 MR. GWILLIAM: Okay.

8 THE COURT: Okay? And I think that what we ought
9 to do is take a pause, because I have another matter that I
10 have to get to, and I would very much like, with your
11 permission, to have a conference in chambers for a while and
12 see if we can make a little more progress when we're sitting
13 a couple feet from each other rather than having you behind
14 the podium.

15 MR. GWILLIAM: Very happy and pleased to do that,
16 Your Honor.

17 THE COURT: Would you be willing to wait to do
18 that?

19 MR. GWILLIAM: I will wait as long as -- I came
20 all the way out here from California today.

21 THE COURT: Well we got some lovely weather for
22 you today, sir.

23 MR. GWILLIAM: Yeah, and my daughter and grandson
24 live out here, so listen, there's some benefits that I'm
25 very happy to have here.

1 THE COURT: Very excellent.

2 All right. Well if you wouldn't mind taking a
3 seat I'm going to call the next matter and then we'll --
4 Ms. Marcus, are you able to stay around?

5 MS. MARCUS: Yes, Your Honor.

6 THE COURT: Okay.

7 MS. MARCUS: That's a great idea. Thank you.

8 THE COURT: Okay. Thank you.

9 All right. What do we have next?

10 MS. ARTHUR: Your Honor, the next matter looks
11 like it's a status conference actually, Your Honor, of Ka
12 Kin Wong --

13 THE COURT: Yes.

14 MS. ARTHUR: -- versus Lehman Brothers Special
15 Financing Inc.

16 THE COURT: Okay. So, I'm just kind of playing
17 around with the schedule here. Should we move on to --

18 MS. ARTHUR: The next one is the 2 p.m. hearing.

19 THE COURT: You're right, the LCOR is at 2 p.m.,
20 so we're down to these two. Okay.

21 MS. ARTHUR: Yes, Your Honor.

22 THE COURT: Thank you. Thank you. All right. So
23 why don't you come on up.

24 All right. So this is LBHI, this is Ka Kin Wong
25 versus HSBC. Yes?

1 MR. SLACK: That's right.

2 THE COURT: Okay.

3 MR. SLACK: So this is a case, Your Honor, that
4 was filed back in 2005. We haven't been before you on this
5 case ever, so this is the --

6 THE COURT: It was up visiting with Judge Batz --

7 MR. SLACK: And that's exactly right.

8 THE COURT: -- among others.

9 MR. SLACK: And what this case concerns, it may
10 help just to do a little background.

11 This is a complex derivative structure. And the
12 way this worked, Your Honor, is that there was an entity
13 called Pacific Finance that issued notes, which sometimes
14 are referred to here as minibonds, and they were in
15 different series, and that's important because each series
16 had their own set of transaction documents.

17 The plaintiffs here are the noteholders or mini
18 bondholders at the Pacific Finance level. And Pacific
19 Finance then entered into a derivative with LBSF. What's
20 interesting is, is that at what we call the minibond level
21 that trust and the trustees do not have what Your Honor has
22 probably seen as a change in the waterfall provision. So it
23 doesn't have that at all, it just says in fact in that -- at
24 that level that LBSF gets paid first whatever it's owned and
25 then money goes out to the mini bondholders.

1 The collateral at that level, at the minibond
2 level was notes from another trust at the sapphire level.
3 So at the sapphire level again you had a more traditional
4 trust, you had notes issued, Pacific Finance bought those
5 notes, and that's the collateral at the minibond level. At
6 that level there is a change in the waterfall. And BNY is
7 the trustee at that level.

8 So, Your Honor, when the first complaint was filed
9 back in 2009 it had a direct claim against LBSF and others,
10 and Judge Peck heard a motion to dismiss in that case.

11 While the motion to dismiss was pending I would
12 note the plaintiffs made a motion to withdraw the reference
13 the first time that Judge Swain denied. Judge Peck then
14 heard the motion to dismiss, granted the motion to dismiss,
15 and it went up to Judge Pauley. Judge Pauley affirmed the
16 dismissal of the direct claims, allowed the plaintiffs to
17 amend to bring derivative claims on behalf of the trust, and
18 also sent back a claim for a constructive trust which Judge
19 Peck had dismissed for Judge Peck to clarify the reasons why
20 that also should be dismissed based on a standing issue.

21 So a new motion to dismiss was --

22 THE COURT: Which he then did?

23 MR. SLACK: He did not, he didn't address it
24 because that was in the new complaint where there was a new
25 motion to dismiss.

1 So the amended complaint was filed, the amended
2 complaint had the derivative claims and then reallege the
3 constructive trust claims.

4 A new motion to dismiss was filed in 2011, and
5 while that motion to dismiss was pending there were two
6 things that happened. One was that the plaintiffs again
7 moved to withdraw the reference. And the other thing was
8 that there was a settlement -- a fairly complex settlement
9 that was taking place in Hong Kong related to all of the
10 trusts at the sapphire level, at the minibond level, it
11 included the trustees in LBSF. That settlement required a
12 number of different steps. It took some time to implement.
13 It had a process by which each of the series of notes had to
14 vote individually, and the votes were essentially in the
15 high 90's. And there's a list in the letter we sent,
16 there's a list of the voting percentages, and it's --
17 they're all -- each series voted again in the high 90's to
18 approve the settlement.

19 There were -- this settlement was effectuated
20 through the derivatives procedures order in front of Judge
21 Peck, and there was an objection to an amendment to the
22 derivatives procedures order. Judge Peck held that again
23 the minibond plaintiffs here did not have standing to
24 challenge the change and amendment to the derivative
25 procedures order. That was also appealed to Judge

1 Sullivan. Judge Sullivan affirmed Judge Peck saying that
2 the plaintiffs here were not parties in interest for
3 purposes of the bankruptcy in order to have standing to
4 challenge the change to the derivatives procedures order.

5 So another --

6 THE COURT: Under a -- their creditor is a
7 creditor's theory?

8 MR. SLACK: Exactly. That's exactly right.

9 So that brings us to essentially where we are now,
10 which is that the new motion to withdraw the reference was
11 denied, and that motion had been pending for four years, and
12 a fully briefed motion to dismiss but briefed again more
13 than four years ago is now pending in front of Your Honor.

14 We've had some conversations with the plaintiffs.
15 It's certainly our view, we think correct, that the
16 settlement here completely resolves these matters, because
17 when you're suing derivatively on behalf of the trust and
18 the trust settles there's no longer any derivative claim to
19 bring. And the analogy of course in the corporate world is
20 that if a corporation settles a claim that settlement is
21 final. If there's a shareholder that objects to that
22 settlement its remedy is to sue the corporation and the
23 directors for some kind of breach. But the actual
24 derivative claim is no longer available. And of course
25 that's exactly the situation we have here where for the last

1 four years ago there really has been no claim that can be
2 brought either directly or derivatively.

3 So we've had some discussions with the plaintiffs.
4 The -- you know, we personally think that the plaintiffs
5 here whose clients got all of the information relating to
6 the settlement, they -- I don't know whether their
7 particular clients voted for it or against it, again, they
8 were overwhelming voted for it, but would have received all
9 of the information with respect to the settlement four years
10 ago.

11 We included information with respect to the
12 settlement in a number of different pleadings. Both in our
13 reply to the motion to dismiss, the amended complaint here,
14 and also in connection with both the motions for the appeal
15 of the change to the derivatives procedures order, and also
16 with the motion to withdraw the reference. And so the
17 plaintiffs have certainly known about this settlement and
18 should have known about it for the last four years.

19 THE COURT: Well maybe apropos of the prior matter
20 maybe it makes sense to have a brief conversation in
21 chambers to talk about this a couple feet apart across the
22 table, if that would be acceptable to you folks. Is that
23 acceptable?

24 MR. DAVIS: Your Honor, Jason Davis of Robbins
25 Geller Rudman & Dowd --

1 THE COURT: Yes.

2 MR. DAVIS: -- for the plaintiffs. Yes, we think
3 that's an excellent suggestion.

4 THE COURT: Okay.

5 MR. DAVIS: And we support it.

6 THE COURT: All right. So why don't we do that,
7 Mr. Slack. And then, Ms. Marcus, we'll take this one first,
8 and then we'll come back and we'll go back to the California
9 matter.

10 MS. MARCUS: That's fine, Your Honor.

11 THE COURT: All right?

12 (Recessed at 11:05 a.m.; reconvened at 12:05 p.m.)

13 THE COURT: You don't have to take -- you can keep
14 your stuff there, it's okay.

15 UNIDENTIFIED SPEAKER: (Indiscernible) papers for
16 Lehman.

17 THE COURT: That's okay. Oh, they're Lehman
18 papers.

19 UNIDENTIFIED SPEAKER: Yeah.

20 THE COURT: Okay. I seem to have lost everyone.
21 Here they come. Here they come.

22 (Pause)

23 THE COURT: All right. We're going to go back on
24 the record in LBHI with respect to the plan administrator's
25 supplemental objection to the four hundred and thirty-first

1 omnibus objection to claims, the various claims filed
2 against BNC Bank.

3 And having listened to the arguments of counsel
4 we'll take the matter under advisement and allow the parties
5 an additional period of time to continue discussions among
6 themselves regarding further proceedings.

7 I think it's best, especially since it's August,
8 to let you do that on your own schedule, with the
9 understanding that I do want to keep moving this along
10 because it's been pending for so long. But, Ms. Marcus, if
11 I could impose on you to keep track of the time and contact
12 chambers perhaps, you know, at the very beginning of
13 September and let us know when you'd like to come back in
14 for further status.

15 MS. MARCUS: Of course, Your Honor. And we'll
16 coordinate it with Mr. Gwilliam --

17 THE COURT: All right.

18 MS. MARCUS: -- to make sure it's convenient.

19 THE COURT: And, Mr. Gwilliam, notwithstanding
20 fact that you can enjoy being in New York, if at the next
21 time it would be better for you to appear telephonically by
22 all means we can arrange for that.

23 MR. GWILLIAM: Thank you.

24 THE COURT: All right?

25 MR. GWILLIAM: I may take you up on that.

1 THE COURT: Okay. All right. Thank you for
2 making the trip.

3 MR. GWILLIAM: I appreciate your time, Your Honor.
4 Thank you.

5 THE COURT: Thank you very much. Thank you.

6 MS. MARCUS: Thank you, Your Honor.

7 THE COURT: Thank you. All right. Ms. Marcus, I
8 don't think there's anything else in the LBHI --

9 MS. MARCUS: No that was the calendar.

10 THE COURT: -- calendar. Okay. Thank you very
11 much.

12 MS. MARCUS: Thank you.

13 THE COURT: If you folks would give me two minutes
14 to get my other file.

15 (Recessed at 12:07; reconvened at 2:05. p.m.)

16 THE COURT: All right. How is everyone?

17 UNIDENTIFIED SPEAKER: Very good, Your Honor.

18 THE COURT: Okay. I'm ready when you are. How
19 are you, Mr. Rossman?

20 MR. ROSSMAN: Very good, Your Honor. How are you?

21 THE COURT: Okay.

22 MR. ROSSMAN: If I may, Andrew Rossman, Quinn
23 Emanuel on behalf of Lehman Brothers Holdings, Inc.

24 If you'll indulge me, Your Honor, I think it would
25 be helpful is for me to first give you a brief overview of

1 this case. I think this is the first time that we've
2 appeared before you in this matter.

3 THE COURT: It is and I'm happy to listen. I have
4 read everything that's --

5 MR. ROSSMAN: I have no doubt.

6 THE COURT: -- been filed with some interest, so
7 I'm looking forward to hearing more.

8 MR. ROSSMAN: Great. So my essential game plan is
9 to give you a brief description of the dispute in general,
10 an overview of the motion, and then I'll take you through
11 what I think are the principle points. It is, of course, a
12 motion to amend.

13 THE COURT: Right.

14 MR. ROSSMAN: And you have not only the motion,
15 but you have a clean copy and a redline copy of the proposed
16 second amended complaint.

17 THE COURT: Right.

18 MR. ROSSMAN: Just so you follow the bouncing
19 ball. We file an amended complaint in December of 2014, as
20 to which there was no objection. Principal change there was
21 to add Barclays as a defendant. And there's factual
22 allegations added to, and then this amendment was filed in
23 June, as a motion I should say, as a proposed amendment.

24 So what's at stake here, Your Honor, is one swap.
25 This is a fixed for floating, what --

1 THE COURT: Right.

2 MR. ROSSMAN: -- we consider to be a plain vanilla
3 interest rate swap.

4 THE COURT: Right.

5 MR. ROSSMAN: The context of this is there was a
6 bond issuance that Lehman assisted the entity that owned
7 this building in Alexandria, Virginia which is a post office
8 that was used to finance the building.

9 THE COURT: Right.

10 MR. ROSSMAN: And bonds were floating rate bonds,
11 so the entity had a risk, it faced exposure, with respect to
12 interest rates.

13 THE COURT: Right.

14 MR. ROSSMAN: So to hedge that, entered into a
15 swap with LBSF, which is a Lehman subsidiary that
16 principally enters into these types of transactions, and it
17 was a fixed for floating rate swap.

18 So we understand the economics here, the
19 obligation of LCOR, I'll call it LCOR for short, but this is
20 the LCOR Alexandria entities --

21 THE COURT: Right.

22 MR. ROSSMAN: -- who are the defendants, had an
23 obligation to pay a fixed rate of approximately 6.8 percent
24 on that swap. The duration of the swap, the swap matured in
25 2032 --

1 THE COURT: In 2032.

2 MR. ROSSMAN: -- you're ahead of me already, Your
3 Honor, so for 24 years, Lehman's counterparty had an
4 obligation to pay 6.8 percent, 6.8005 percent I think is the
5 precise number, and received a floating rate, which was live
6 or plus I think it was 23 basis points.

7 THE COURT: Uh-huh.

8 MR. ROSSMAN: So slightly over three month live
9 or, which at the time was dramatically low. In fact, the --
10 Your Honor's heard all about --

11 THE COURT: Forward curve.

12 MR. ROSSMAN: -- the forward rate, forward curve.
13 So the relevant question is, primary relevant question,
14 economically speaking is, what was the interest rate for
15 instruments of this duration at that time period, and it was
16 less than 3 percent.

17 So what you had was an instrument that was
18 massively in the money for Lehman. If it stayed in place
19 for 24 years, Lehman would get the interest of the 6.8
20 percent, and would be paying back something that was worth
21 less than 3 percent.

22 Lehman calculated that in the money value to be
23 worth about \$24 million at the time of termination. So the
24 swap was terminated at LCOR's initiation using the LBHI
25 bankruptcy filing as the event of termination. They didn't

1 terminate in September, they terminated in December, okay.

2 Instead of finding \$42 million in Lehman's favor
3 as the valuation, they actually swung past zero, and LCOR
4 determined in its calculation statement that Lehman owed
5 LCOR \$6 million. And that was what was initially
6 challenged. It was challenged as an incorrect or sham even
7 calculation because it seemed so obviously wrong, and at the
8 time the case was being handled by Weil Gotshal as debtor's
9 counsel.

10 THE COURT: Was that -- so the -- they went from
11 market to loss that -- and that calculation was attached to
12 a complaint that was ultimately delivered?

13 MR. ROSSMAN: Interestingly, Your Honor, they did
14 not file a proof of claim, and I think it's suspicious that
15 they didn't file a proof of claim, when they thought they
16 were owed \$6 million. I think one of the consideration, I'm
17 purely speculating, but perhaps they didn't want to sign
18 their name to a court pleading.

19 THE COURT: So there is no filed proof of claim
20 for that amount?

21 MR. ROSSMAN: There's no filed proof of claim.
22 This is Lehman's adversary proceeding against LCOR.

23 THE COURT: Right.

24 MR. ROSSMAN: Okay. So what Lehman's learned in
25 the course of first 2004 and then formal discovery in the

1 adversary proceeding is that, in fact, what LCOR did and did
2 not disclose to Lehman is it entered into a replacement swap
3 where Barclays stepped into the shoes of Lehman on the swap.
4 Barclays took over the obligations to LCOR, inherited the
5 benefit of the receipt of that high level of interest. And
6 for that, it paid LCOR over \$15 million.

7 So LCOR received on a transaction or claimed that
8 it suffered a loss of \$6 million, it actually entered into a
9 replacement swap and received over \$15 million in cash for
10 that.

11 We also learned that the individuals at Barclays
12 who were involved in that swap were individuals who had
13 responsibility while they were still employees of Lehman for
14 creating and handling that transaction. So they were
15 insiders to the transaction, they had the benefit of
16 information that they had while they were under fiduciary
17 obligation as employees to Lehman, they took it with them,
18 including confidential information to Barclays when they
19 went over with the sale of the broker dealer and took
20 advantage of that to step into this high valuable swap.

21 And that is frankly, Your Honor, why we got
22 involved in the case as conflicts counsel to handle the
23 Barclays issue, Quinn Emanuel became involved at the end of
24 2014, November 2014, trained our attention on that issue and
25 filed the amended complaint that included the addition of

1 the Barclays defendants in 2014.

2 What we have also learned in the course of
3 discovery, is that there were other entities involved, and
4 it's worth taking a minute to make sure that Your Honor
5 understands what the different defendants and opposed new
6 defendants are and what their roles are.

7 So Barclays, it's pretty obvious they were the
8 replacement swap provider, okay. LCOR and a related entity
9 called PTO Holdings, which as I understand it, is the --

10 THE COURT: Patent and Trademark Office, PTO,
11 right?

12 MR. ROSSMAN: Precisely, Alexandria PTO --

13 THE COURT: Right.

14 MR. ROSSMAN: -- is that. The PTO Holdings entity
15 is the immediate parent, if you will, of LCOR, which was a
16 swap counterparty to Lehman, and that entity in turn, we
17 believe, is owed by something called Rosegreen Trust, and
18 ultimately that is owned by the related companies and/or
19 their principals and families.

20 As you go further up the corporate chain, our
21 visibility greatly diminishes, but that's our understanding
22 based on the discovery that we have so far.

23 Mr. O'Toole is a related executive and he has had
24 -- I understand he's in the courtroom today, and he had
25 involvement in the events and we'll have a chance to go

1 through the specifics of that, okay.

2 So you've got Barclays sort of one category, then
3 you've got what I will call the LCOR parties, which are all
4 the entities that are related or affiliated with the related
5 companies, and ultimately the LCOR Alexandria entity that
6 was a swap counterparty, and then you've got two other
7 defendants who were involved in the transaction as advisors,
8 Mr. Gross and the entity that he owns and controls called
9 BWRA and they were brought in as one of two swap advisors,
10 if you will, who were involved in the transaction. And
11 they're one that we view as a culpable participant, both
12 because of their involvement in the close-out and the
13 replacement swap and behavior that we think is frankly,
14 pretty shocking wrongdoing, and also because they were
15 direct or indirect recipients of proceeds of the swap.

16 So we view them as liable, both in terms of --
17 liable as transferees and liable as participants, and that's
18 also true of the other new defendants who were in the
19 related companies or LCOR chain. So those are three
20 categories of defendants that we have, Barclays running the
21 case, LCOR and PTO Holding is already in the case.

22 The new defendants are Rosegreen Trust, the
23 related companies, Mr. Gross, BWRA and Mr. O'Toole. And
24 I'll take a moment to walk through those.

25 What I would explain to Your Honor is what we

1 learned in discovery is that, in fact, this was supposed to
2 be a market quote ISDA, so you understand how the market
3 quote works, you go out to market, get four quotes, you take
4 the middle of the average of the two, don't ask me why they
5 made it four, this is what they did. In fact, what we
6 understand is that they deliberately failed the market quote
7 process, as part of a design, as part of a scheme to get to
8 loss. And then come up with a calculation that suited them,
9 rather than suited the economic reality.

10 So, for example, we see from BWRA a memorandum,
11 this is one of the swap advisors, a memorandum a day prior
12 to the effort to solicit quotes saying that there were no
13 quotes, that's already failed the quote process. So they
14 have, you know, foreordained, if you will, that they're
15 going to get the result of note quotes.

16 And when you send someone out to do that, who
17 knows how the market works, it's not very hard to achieve.
18 So this Chatham Financial who is one of their advisors
19 initially evaluated the value of the swap as I've described
20 it to you on an economic basis, and told LCOR, and this is
21 back in November, so interest rates were actually a little
22 bit higher then than they were in December, rates continued
23 to go down as things got more challenging in the economy,
24 and the Government tried to help. The --

25 THE COURT: Meaning that the value of the swap

1 continued to move in LBSF's favor.

2 MR. ROSSMAN: The value of the swap from November
3 to December moved in Lehman's favor.

4 THE COURT: Lehman's favor.

5 MR. ROSSMAN: Correct, exactly, Your Honor.

6 So in November, Chatham advises -- we have a memo
7 about this, which we also got in discovery, that swaps were
8 at \$19 million to Lehman. So promptly what the defendants
9 do is they take Chatham out of that part of the work, they
10 no longer ask Chatham to make a loss calculation, and they
11 just instruct Chatham to go forth and do the quote process,
12 because Chatham has relationships with the dealers in the
13 market.

14 The quote process results in no quotes because
15 that's how they designed it, and they tested the market
16 beforehand, knew who the dealers were who were not
17 interested in this, and dialed them up and told them to say
18 no, and they said no, is effectively what we have alleged in
19 the complaint and what we think we'll be able to show.

20 In fact, they knew that there was an actual quote,
21 it wasn't just a quote, it was an actual transaction with
22 Barclays before they went and failed the quote process, and
23 that takes no -- you know, is nowhere reflected in the
24 report showing it failed the quote process.

25 There was an indication of interest in Deutsche

1 Bank to ask for more documents, they didn't know how to
2 handle that, other than to say, don't give Deutsche Bank
3 more documents, and you know, we're going to treat that --
4 we'll just ignore that and look for no's elsewhere.

5 So and what was shocking to us, is they
6 deliberately failed. They went and calculated a loss not
7 with reference to the Barclays swap that they actually did,
8 okay, which reflected, you know, at least one marker, but
9 with respect to their own calculation, and even made matters
10 worse by adding into it a theoretical interest rate cap
11 which the cost of the theoretical interest rate cap, which
12 of course, they would never have needed because they already
13 had a replacement swap with Barclays, which took care of all
14 their interest rate risks.

15 So there's quite a bit of manipulation here that
16 we learned about in the course of this. And what we've been
17 trying to do since we've --

18 THE COURT: So they -- so eventually they
19 terminate, right, and they send -- they do send the loss
20 calculation?

21 MR. ROSSMAN: They do send a loss calculation,
22 that's right. And that's the one that reflects \$6 million
23 in their favor.

24 But they don't file a proof of claim, they don't
25 pursue it. They simply keep the proceeds of the Barclays

1 swap. And our beef with Barclays, to be clear, Your Honor,
2 is two-fold. One is, we think that Barclays took advantage
3 of Lehman information, because the Lehman employees went
4 over to Barclays --

5 THE COURT: Was there anything -- so the question
6 that might be outside the purview of what you're prepared to
7 talk about though --

8 MR. ROSSMAN: Sure.

9 THE COURT: -- was there anything in the APA that
10 dealt with this very situation? Because obviously the APA
11 specifically contemplated that many, many of the Lehman
12 employees would transition over to Barclays.

13 So is the --

14 MR. ROSSMAN: That's right.

15 THE COURT: So is the use by these individuals of
16 this information in and of itself wrongful?

17 MR. ROSSMAN: We think so, Your Honor. And that's
18 one of the allegations that we make in the complaint. That
19 the use of the information was wrongful. Okay. And we
20 don't think it's sanctioned by the APA.

21 THE COURT: So the transaction stayed. Barclays
22 didn't own the transaction, obviously LBSF owned the
23 transaction.

24 MR. ROSSMAN: Correct.

25 THE COURT: Okay. All right.

1 MR. ROSSMAN: Okay. So Barclays not only
2 benefitted by using the information, they benefitted
3 because, you know, economically they got a dramatically in
4 the money swap, and they got it at, you know, a below market
5 price, and we believe what -- you know, one of the things
6 that we'll be exploring, one of the things that we allege,
7 Your Honor, is that it was -- what LCOR was looking for was
8 a cooperative participant, not a true arm's length dealer
9 who had given the full price, but someone who was willing to
10 go along with their scheme to give them a replacement swap
11 which they needed to get rid of their interest rate risk.

12 THE COURT: So 15 is a pretty good price for 42 of
13 value?

14 MR. ROSSMAN: We think it's a sweetheart price,
15 that's right. Okay.

16 But Barclays has objected to the amendment, that
17 amendment stands. Barclays hasn't objected to this
18 amendment. What we're here today -- why we're here today is
19 because the LCOR defendants or LCOR and PTO have made an
20 objection primarily to our addition of new parts, and the
21 new part is what we explained, that are affiliates to PTO or
22 LCOR or advisors to them, and that's what their objection
23 is.

24 Now, I say, Your Honor, we are very cognizant of
25 the limited resources of the Court that are stretched by

1 this case, and we are cognizant of our limited resources,
2 and we wouldn't be chasing things that we think don't have
3 value or that don't have supportable legal positions.

4 Here, we think it clearly has both. Our concern,
5 very frankly, Your Honor, is that when we've spent time, and
6 I'll be very careful as Mr. Tizzaio (ph) was in his
7 affidavit not to reveal any settlement communications or
8 offers of settlement.

9 But what we are very concerned about is we were
10 being told by individuals representing LCOR and PTO that we
11 should have reason to fear that we're not ever going to be
12 able to collect the judgment against these entities.

13 They very much led us both in settlement
14 discussions and in the incompleteness of their production, I
15 think frankly very suspicious, incompleteness of their
16 production in discovery, they led us to believe there wasn't
17 money available to answer a judgment. That the money had to
18 move, the money was gone, with respect to PTO Holdings that
19 have the proceeds of the Barclays swap, and that we would
20 end up, you know, chasing a -- you know, if not a bankrupt
21 entity, an entity that was unable to answer the judgment.

22 And that caused us to take a deeper look, frankly,
23 and to try to get an understanding of where the funds went,
24 and who were the individuals involved. At the same time --
25 well, actually later, up through and including October of

1 2014, we got some of the most interesting documents. As
2 Your Honor knows from private practice, frequently is at the
3 end of the discovery rainbow and you actually get the most
4 relevant documents, they finally produce to us documents
5 that reveal the true role and the true culpability of Mr.
6 Gross, BWRA and others in this scheme.

7 So, you know, we were aware of the names of the
8 individuals, we were aware that they were involved, Mr.
9 O'Toole, Mr. Gross were involved in discussions seeing if we
10 could get a settlement of this case, okay, but what we
11 didn't realize until we saw some frankly pretty shocking
12 documents, that they were actually involved in concocting
13 the scheme.

14 And that as individuals, not only do they have
15 their, you know, fingers dirty with the wrongdoing, but they
16 actually were recipients of proceeds. They received an
17 economic benefit including in the case of BWRA, Mr. Gross'
18 entity, he threatened suit against the LCOR PTO Rosegreen
19 entities when he didn't get adequately paid for the
20 transaction.

21 And he was asking for at one point as much as a
22 million and a half dollars because he described, he
23 delivered to them effectively a windfall of some close to
24 \$16 million, and he wanted to get paid for that. And he
25 threatened to expose this by bringing a lawsuit, and they

1 ultimately settled with him, frankly buying his cooperation,
2 keeping him quiet for a payment of \$200,000 plus a 5 percent
3 interest in the outcome of this case.

4 So whatever proceeds, you know, they think they
5 may keep at the end of this following, you know, litigation
6 or a settlement, he's entitled to 5 percent of that under
7 their settlement.

8 So it was seeing that document, and obviously
9 these things take time, Your Honor, we've got to actually
10 get the documents, upload the documents, review the
11 documents, find them and appreciate their significance.

12 And we realized, okay, you know, there are people
13 here who are involved in the wrongdoing, who should be held
14 to account for their conduct, and maybe recipients of
15 proceeds.

16 So, you know, I'll take you, Your Honor, if I may
17 to, you know, why we want to amend and what we did with this
18 amendment.

19 So we -- having the benefit of this discovery, we
20 made an effort to try to give a more detailed recitation of
21 the facts, okay, incorporating the documents that we
22 received at the end of 2014.

23 So sequence of events is received those documents,
24 we've trained our attention on the Barclays amendment and
25 submitted that amendment. And we told all of the defendants

1 at the time in January that we intended to amend the gap.
2 So we sort of put the case on hold while we sorted through
3 all those documents, and made our effort to try to come up
4 with a comprehensive pleading so everyone would know, you
5 know, exactly what's at stake in the case.

6 And, you know, we expect there may be motions
7 filed against this pleading, the test of litigating this
8 pleading, we wanted to make sure that it had all of the
9 relevant facts in it. And we wanted to make sure that we
10 were for the benefit of creditors, that we were recovering
11 all of the potential parties who may have received transfers
12 because we didn't have complete knowledge or visibility into
13 where all the money went.

14 So that's what we did. If you look at to -- if
15 you don't like reading redlines, which I find intolerable,
16 you can look on pages 6 through 10 of our opening brief, and
17 we explain entity-by-entity what it is that we did in the
18 amended complaint, starting with Mr. O'Toole.

19 Mr. O'Toole is a beneficiary of the Rosegreen
20 Trust, he's an executive related, he had control over these
21 entities, and frankly was one of the individuals who
22 masterminded this scheme. In addition to his direct
23 involvement, he received a pay-out of \$185,000 from the
24 Barclays swap proceeds.

25 Related and Rosegreen, talk about what those

1 entities are. We think they're the true parties in
2 interest, or beneficial owners above LCOR and PTO Holdings,
3 and you see reference in the documents we got ultimately
4 from BWRA and Chatham, that they believed they were acting
5 on behalf of those entities.

6 So, for example, when Chatham was out talking to
7 the dealers in the marketplace, it represented itself as
8 working on behalf of the related companies, because it
9 wanted to tell the marketplace that it was acting a big
10 important real estate concern, hoping that, you know, the
11 dealers would play along.

12 Mr. Gross and BWRA as I mentioned were advisors.
13 Mr. Gross described himself as Mr. O'Toole's favored
14 financial engineer in correspondence, when he was seeking
15 his additional fee, and you know, he's the one who brought
16 the potential claim that resulted in settlement that I
17 describe below.

18 An additional allegations in the complaint include
19 exactly how they manipulated the market quotation process,
20 including, you know, at one point instructing Goldman-Sachs
21 to respond no to a request for a market quotation.

22 So primarily that's what we did, is added
23 additional defendants, and add substantial additional facts,
24 Your Honor. We've also narrowed the theories of liability.
25 We've eliminated a couple of causes of action, mindful of

1 your rulings in the Raymond James' case and other similar
2 cases, so there's the money had received and turnover claims
3 are eliminated. We don't want to waste any time on that.

4 And, you know, as I mentioned, you know, trying to
5 make sure that we've got the complete set of potential
6 defendants, based on what we see is the flow of funds.

7 Now, I want to talk about, if I can, Your Honor,
8 some legal issues that relate to this. As you know, as
9 anybody who remembers anything from civil procedure knows,
10 leave to amend is freely granted. And, you know, here we
11 don't think there's a serious dispute that we met the Rule
12 15(a) standard for adding additional factual allegations.

13 So the allegations that we have against Barclays,
14 the allegations we have against existing defendants, clearly
15 those fit within that very generous standard, where you can
16 amend, years later you can amend, during trial to conform
17 evidence, essentially Rule 15 is trying to say the Court
18 should disputes on the merits.

19 THE COURT: Sorry. So the real interesting
20 question here is the new parties.

21 MR. ROSSMAN: Correct. So let's talk about that.

22 THE COURT: Right.

23 MR. ROSSMAN: So as opening matter, LCOR and PTO
24 don't have standing to oppose our claims against new
25 defendants. What the new defendants could have done, and

1 chose not to do, is they could have intervened for the
2 limited purpose of opposing the amendment, arguing futility
3 or the statute of limitations, they had a right to do that -
4 -

5 THE COURT: Right.

6 MR. ROSSMAN: -- people do that in cases. They
7 didn't do that. They lie in the weeds and they relied on,
8 you know, their close comrades in LCOR and PTO Holding, but
9 we think it's quite clear and we cite, among other cases,
10 the WSA, Inc. versus ACA case in the Southern District 1996,
11 they don't have standing to make that assertion.

12 So we think the lack of standing bars their
13 objection and ends the debate right there.

14 I will, you know, for sake of completeness, Your
15 Honor, talk about the other issues. We talked about, you
16 know, the general standard under Rule 15. I think what
17 we're really considering here is the question of whether
18 there is a futility problem, because the additional
19 defendants are protected by a statute of limitations, and
20 leave to amend should be denied because it would be a
21 futility.

22 A couple of things I want to walk you through,
23 Your Honor. The -- first I want, because it relates to two
24 elements here, which is the element of undue delay and the
25 element of good faith. I want to take a minute and walk you

1 through the timeframe of our involvement in these
2 allegations, okay.

3 What they've got to show, and the cases make it
4 clear, is you've got to show that there was not just really
5 delay, but there was undue delay. So we cite numerous
6 cases, including a Second Circuit called Richardson
7 Greenshields which collects a whole bunch of interesting
8 cases, that say you can have years and years of delay, you
9 can amend during the course of trial, you can file long
10 after you knew about the new facts, all of this is permitted
11 by Rule 15, it's not undue delay.

12 The good faith prong really you've got to show
13 something that is in the nature of bad faith, on the part of
14 Lehman. And we would come to Your Honor and say, we have
15 nothing but good faith, but I will demonstrate to you all of
16 the diligence and all of the effort that we made to come to
17 the right answer here.

18 So as Your Honor well knows, there's an extensive
19 ADR process in this case, we try to settle before we even
20 file, we had a mediation process pursuant to Judge Peck's
21 order mandatory mediation back in March of 2012, that was
22 unsuccessful. And that was unsuccessful, Lehman took it
23 onto itself to try to settle outside of the mediation before
24 it filed anything, so in May of 2013 there was another set
25 of settlement meetings. Mr. Tizzaio is in the courtroom and

1 submitted an affidavit. Attended those, and had discussions
2 with both Mr. Gross --

3 THE COURT: So during that time frame without
4 getting into the substance of the settlement discussions,
5 you were more or less dealing with this as simply a plain
6 vanilla swap termination.

7 MR. ROSSMAN: That's -- well, I wasn't, because I
8 wasn't in the case yet, but that's correct.

9 THE COURT: Right. So it was being dealt with as
10 a plain vanilla swap termination, and the question of we
11 view this as very much in the money to Lehman, why doesn't
12 LCOR agree.

13 MR. ROSSMAN: Correct.

14 THE COURT: In other words, there wasn't the
15 visibility into -- behind the curtain of what had happened.

16 MR. ROSSMAN: That's right, Your Honor. And there
17 was -- Lehman had some information, it had some 2004
18 discovery, but you know, that's the way it was initially
19 viewed in the case. Although as the discussions went on,
20 and you know, it was being told by Mr. O'Toole and Mr. Gross
21 that Lehman's never going to find the money, Lehman's never
22 going to get an effective judgment against these entities,
23 of course, you know, Lehman started to grow concerned that
24 there was more going on here.

25 But truthfully it wasn't until the discovery that

1 came in towards the end of 2014, did we really have a full
2 understanding of exactly the level of manipulation here and
3 the basis for additional claims.

4 So just to continue to walk through the process.

5 THE COURT: Uh-huh.

6 MR. ROSSMAN: The initial claim was filed November
7 of 2013 by Weil, and you'll see it's a relatively
8 unremarkable complaint that's attacking the close-out, Your
9 Honor, as you've seen many variations of that. And then
10 there's another settlement meeting because, you know, as you
11 well know, we try very hard to settle these rather than
12 litigate where we don't have to in June of 2014, where Mr.
13 Tizzaio was, you know, effectively being taunted by, you
14 know, the PTO and LCOR representatives there, which included
15 Mr. O'Toole that they're never going to get a judgment.

16 So, you know, we very much, at that point, started
17 getting concerned, and discovery was pressed, and in the
18 last production of documents in October of 2014, we got,
19 among other things, a bank statement that showed the PTO
20 Holdings account at I believe Bank of America had been
21 emptied out, and there were no funds in it.

22 And if you would, Your Honor, if you look at
23 Exhibit J to Mr. Califano's declaration --

24 THE COURT: I actually did not bring that out with
25 me.

1 MR. ROSSMAN: Ah, we've got one.

2 THE COURT: Do you have an extra copy?

3 (Pause)

4 MR. ROSSMAN: It's hiding in plain sight, Your
5 Honor.

6 May I approach, Your Honor?

7 THE COURT: Sure. If I bring out all the paper on
8 a Lehman day, there won't be room for me to sit, so thank
9 you.

10 MR. ROSSMAN: I understand that.

11 THE COURT: So does counsel know, do you know the
12 page that Mr. Rossman's referring to?

13 MR. CALIFANO: Yes, I do, Your Honor.

14 THE COURT: Okay.

15 MR. CALIFANO: I have my declaration here.

16 THE COURT: Okay.

17 MR. ROSSMAN: So what it is, is a spreadsheet and
18 you'll see in the column labeled redemption, on August 2nd,
19 2012, a redemption in the amount of \$14.915 million. And
20 shows as of that date a zero balance in the account. This
21 is all we got in discovery.

22 So we had reason to believe that the account was
23 emptied, and we have people telling Mr. Tizzaio, you're
24 never going to collect. So, you know, Lehman had good
25 reason to be concerned about how it was going to get back

1 the value that was taken from it, the swap transaction, who
2 were the recipients who were unjustly enriched, who got the
3 benefits of what was in this account on the Barclays swap.

4 So that's October 2014, we were retained in
5 November, and filed the Barclays complaint, is first amended
6 complaint in December. And January 12th, 2015, we told LCOR
7 that we intended to file an amended complaint, to put
8 everything on hold.

9 We provided a draft, it took a long time to get
10 through the documents, and frankly we got human resources of
11 the estate to be able to review and give us clearance on
12 some of these things. We had a draft of the complaint that
13 we provided April 17th. LCOR, they would not consent to the
14 amendment. We had some confidentiality issues that we had
15 to sort through, some additional as we prepared to file the
16 complaint, we found additional documents we wanted to
17 include, we had to go through the confidentiality drill
18 again. June we filed.

19 THE COURT: I think that in the interest of moving
20 along, I think that the issues -- you've done a good job of
21 presenting the timeline with respect to the issue of delay,
22 undue delay, timing regarding the amendments and otherwise.

23 I think that to the extent that you have more to
24 say about the futility argument, so to speak, maybe we could
25 move to that.

1 MR. ROSSMAN: Let me turn to that, Your Honor.
2 The one thing I did -- the last thing I want to mention on
3 this, and I do feel that -- you know, a little bit attacked
4 on the subject so I've taken my time to go through it.

5 THE COURT: Well, this is -- the replacement of
6 counsel has led to a dramatic and drastic reformation of
7 Lehman's theory of the case. So, you know, a number of
8 things in all these pleadings stand out, and that statement
9 stands out. So what you've said is that as this ripened
10 into a litigation, as opposed to a claims resolution, your
11 firm stepped in as conflicts counsel, not necessarily
12 smarter or better counsel, just different counsel.

13 MR. ROSSMAN: That's right, Your Honor. And as we
14 learn more shocking developments in the case, right.

15 So the last thing I just wanted to mention
16 quickly, Your Honor, when we were -- when we delivered the
17 information, the new post amended complaint to Mr. Califano
18 and his firm, they told us that we were wrong, that in fact,
19 the money was there, in the PTO Holdings account, and they
20 gave us information about that.

21 What it turns out is, the money had been moved out
22 of the account, there's no money in the Bank of America
23 account anymore. Apparently money was moved into an account
24 at Signature Bank, okay, which we didn't know, and they will
25 provide us discovery of that, and maybe an issue we take up

1 later why they didn't provide the discovery of that, clearly
2 it was called for.

3 And they showed us an account statement, and when
4 we got that, we amended our draft complaint, we revised our
5 draft complaint to take out that allegation, and to take
6 them at their word.

7 Now, we don't, you know --

8 THE COURT: So is the money still in an account in
9 the name of PTO?

10 MR. ROSSMAN: That's what Mr. Califano has said in
11 his filings.

12 THE COURT: Uh-huh.

13 MR. ROSSMAN: We don't know the reality, we
14 haven't completed discovery, and frankly seeing the money
15 bouncing around concerns.

16 THE COURT: Okay.

17 MR. ROSSMAN: But the point is, we listened. We
18 did revise the complaint and we filed it. So all of this is
19 to say, you know, the actions were taken in good faith. So
20 now I turn to futility, okay.

21 As I already mentioned, to the extent that we add
22 new factual allegations as opposed to new defendants,
23 there's no question it's not futile. I don't think there's
24 a serious debate about that. So really what we're talking
25 about are claims against new defendants.

1 Two different things to keep your eye on here,
2 Your Honor. To the extent there were transfers that were
3 made within six years of the filing of this complaint, June
4 2015, there's zero debate that those are timely, okay. We
5 don't have to contort ourselves with relation back and the
6 meaning of Rule 15(c) which we'll get into in a minute.

7 And there's -- we don't know, because we don't
8 have complete visibility into everything that was
9 transferred, but we're aware of one such transfer, we're
10 aware that in September 2010, there was a \$200,000 payment
11 to BWRA as part of the settlement. That is clearly timely.

12 Our claim is for unjust enrichment, as part of
13 the, you know, it was paid indirectly through related, but
14 it was paid out of the Barclays proceeds, and we think under
15 any view of the case, that's a timely claim.

16 So now we get to our fed court's lesson today,
17 which is relation back.

18 THE COURT: Relation back, right.

19 MR. ROSSMAN: So what you've got to meet for
20 relation back is three elements. You've got to show that
21 the claims arise out of the same conduct transaction
22 occurrence. It's actually -- that's a very lack standard,
23 and that's easily met here. I think they make a make-way
24 argument on that, but I don't think I need to take up much
25 of the Court's time, it's the same swap, close-out and the

1 replacement swap that we're talking about.

2 Second is the question of whether the new
3 defendants received notice of the lawsuit. They clearly
4 received notice of the lawsuit, they were involved in
5 settlement discussions going back to 2013 there. They're
6 quite aware of this case, and there's no prejudice to them
7 at all, which is a critical point to be made here, Your
8 Honor, and you know, prejudice is one of the principal
9 factors in considering a Rule 15 motion. None is really
10 alleged on the part of the LCOR defendants.

11 So the last one, which is of the most academic
12 interest at least to Your Honor is the requirement that the
13 new defendants knew or should have known that the action
14 would have been brought against them but for a mistake
15 concerning the proper parties' identity. And that's Rule 15
16 -- it's a tongue twister, but it's Rule 15(c)(1)(C)(II) is
17 the mistake prong of relation back under Rule 15(c).

18 And one of the reasons why I spent the time and
19 energy to walk you through the timeline is for you to
20 understand that what you have is an effort by Lehman in good
21 faith to sort out the bodies. We're trying to understand in
22 this complex web of companies that we don't, you know, have,
23 these are not public companies, we don't have clear
24 visibility into these entities. We're trying to sort out
25 who are the responsible parties.

1 And that doesn't just involve understanding of
2 corporate ownership relationships and the names of the
3 people, and the names of the entities, it also involves
4 understanding what their role was. It also involves
5 understanding what their culpability was for the underlying
6 wrongdoing that's alleged.

7 And the other piece of this puzzle is following
8 the money, which we tried to do, and we got incomplete
9 information on that as well.

10 So when we thought that we, you know, saw that
11 there was no money in the account, you know we pursued that
12 with more vigor. For some of these individuals, we were
13 able to see transfers to them, and we've made allegations of
14 unjust enrichment based on those transfers. We don't know
15 that we have a complete set of everything. So those are the
16 two things that we set out to do.

17 Now, on 15(c)(1)(C)(II), basic argument that we're
18 met with here, is that you can't add new parties as to
19 opposed to substituting a mistaken party. So they rely on a
20 case called Barrow, which was decided in the Second Circuit,
21 and their interpretation of Barrow is that mistake means
22 that you name party A when you intended to name party B, and
23 you've got to substitute B for A, okay.

24 Since Barrow, the Supreme Court stepped in, and
25 decided in the Krepsky (ph) case that that's not right.

1 That's not the focus. And, in fact, the focus is on the
2 knowledge or understanding of the potential defendants, not
3 what's in the plaintiff here Lehman's mind, right.

4 So the question is, did the defendants have reason
5 to know that they were but for a misunderstanding on the
6 part of the plaintiff that they were parties that would have
7 been sued.

8 And on that, we have two bases, Your Honor, to
9 reach that conclusion, which we think we're clearly entitled
10 to.

11 First, let's make sure we understand the law. We
12 cite in our brief, three recent Southern District cases,
13 three different judges, okay, respected judges, where they
14 all come to the conclusion that you can name additional
15 parties. They're of course clearly wrong about that legal
16 point.

17 Krepsky says that if you got a mistake, if you are
18 mistaken as to the role or the culpability of the other
19 defendants that you now want to name that that meets mistake
20 under Rule 15(c). And as a --

21 THE COURT: So that's SRAL Gallery and Rico
22 Navarro (ph) and Lon Disponk (ph) and the Abdel (ph) case,
23 right?

24 MR. ROSSMAN: Exactly, Your Honor. Exactly, Your
25 Honor. And these frequently involve -- the SRAL case is one

1 that involves executives of a company, and the need to
2 develop an understanding of exactly what that role was, and
3 their culpable participation before they could name them as
4 defendants.

5 The Abdel case involved police officers, many of
6 these cases happened in Ninth Section 1983 context or a, you
7 know, claims against --

8 THE COURT: Well, and then you also have Randall's
9 Island Family Golf (ph) which had --

10 MR. ROSSMAN: Which is a transfer case.

11 THE COURT: Which is a transfer case,
12 significantly which is a transfer case.

13 MR. ROSSMAN: That's right, Your Honor.

14 THE COURT: Yeah.

15 MR. ROSSMAN: And we think the Randall's Island
16 case is a great example of facts similar to these, where you
17 don't know exactly where the money is going.

18 But the important point here is we had an
19 imperfect understanding of where the money went, we had an
20 imperfect understanding of what the roles were of the
21 various players. And as that understanding evolved, we made
22 a good faith effort to name them. And the individuals,
23 because they're so closely tied in to the entities that were
24 already defendants, they well knew, they well knew what
25 their role was, they well knew what their culpability was.

1 They anticipated this litigation in the settlement
2 agreement between BWRA and LCOR specifically anticipates the
3 possibility of a Lehman dispute, and what happens in the
4 case of a Lehman dispute.

5 So we think there's no question there we meet the
6 Krepsky standard. We don't think you have to resolve the
7 question of whether Barrow is good law or bad law, in order
8 to reach the conclusion that the judges did in those three
9 cases that the claim is good.

10 The last thing I'll mention on the statute of
11 limitations, Your Honor, is we've got an independent basis
12 under state law. So Rule 15(c)(1)(A) says -- federal rules,
13 says that if you're timely under the law of the jurisdiction
14 whose claim it is, here it's New York, okay it's an unjust
15 enrichment claim in New York, then you're timely,
16 irrespective of whether you meet the federal standard.

17 And New York has under the CPLR, Section 1024, has
18 a specific codification of John Doe practice. And here what
19 we named is John Doe's in the original complaint, and in the
20 amended complaint, were recipients, John Doe 1 through 10,
21 recipients of the Barclays swap proceeds.

22 And we did that because we knew we had imperfect
23 information, and we knew we'd have to sort out the bodies.
24 They knew that they, you know, were among those John Does.
25 And in addition to having a right to amend them in the

1 federal standard, we have a right to amend under the state
2 standard under Section 1024.

3 And the last thing I'll remind Your Honor, and
4 then I will sit down, is that you've already answered the
5 question, the Raymond James' case about substantively
6 whether we stayed a claim for unjust enrichment, despite the
7 fact that there is a contract here. It's conduct that's
8 outside of the contract like the Building (ph) case as you
9 said in your decision in Raymond James. Thank you, Your
10 Honor.

11 THE COURT: Thank you, Mr. Rossman.

12 MR. CALIFANO: Good afternoon, Your Honor.

13 THE COURT: Good afternoon.

14 MR. CALIFANO: Mr. Rossman told a very interesting
15 story, but it really doesn't have anything to do with this
16 motion. And I think the way to frame this is to look at the
17 pleading, look at the first amended complaint, and what that
18 would have given defendants notice on, and what they've
19 proposed second amended complaint.

20 Now, the story about the investigation they did
21 and the facts they found isn't reflected in the complaint.
22 Because if you look at paragraph 128 --

23 THE COURT: Why would it be reflected in the
24 complaint? The complaint is the product of the
25 investigation, if the allegations against the defendants.

1 MR. CALIFANO: Yes, but it's not -- the complaint
2 that is supposedly the result of their investigation, and
3 the claim, the claim for relief, the unjust enrichment
4 claim, Your Honor, while there are facts, there are not
5 elements of the claim against these new defendants, because
6 it still relates to, as a result, of LCOR's action,
7 paragraph 129.

8 THE COURT: Okay. We need to reset. This is a
9 motion for leave to amend the complaint.

10 MR. CALIFANO: Yes.

11 THE COURT: This is not a motion to dismiss the
12 causes of action. So you're starting at a rather different
13 place than I expected you to go.

14 MR. CALIFANO: Well, Your Honor, the case law does
15 say when you oppose a motion to amend, based on futility,
16 the 12(b)(6) standards.

17 THE COURT: I understand that, but you are
18 deliberately choosing not to address head on virtually
19 everything that Mr. Rossman said.

20 MR. CALIFANO: Your Honor, what Mr. Rossman said
21 about the background doesn't relate to the fact that they're
22 seeking to amend and add these new defendants, Your Honor.
23 Because the original complaint --

24 THE COURT: Uh-huh.

25 MR. CALIFANO: -- had the unjust enrichment claim

1 and it was based on the claim of LCOR's actions --

2 THE COURT: That's right.

3 MR. CALIFANO: -- in the (indiscernible). Okay?

4 THE COURT: Right.

5 MR. CALIFANO: The second amended complaint --

6 THE COURT: Yes.

7 MR. CALIFANO: -- as the unjust enrichment still
8 relating to LCOR's actions not the actions of these new
9 defendants. The case hasn't changed, Your Honor. After --

10 THE COURT: Well -- I'm going to keep interrupting
11 you because first, there's the issue of standing.

12 MR. CALIFANO: Yes, Your Honor.

13 THE COURT: Okay. Which is a real issue.

14 MR. CALIFANO: Yes, Your Honor, but there is a
15 case AgriStone (ph), I just had it here a second ago, which
16 dealt with that issue. And said -- while this is AgriStone
17 Meat & Poultry v Mariah Capital, Northern District Iowa,
18 Eastern Division, while the legal authority on this issue
19 appears to be limited, the cases support a view that a
20 current defendant may assert futility on behalf of a
21 prospective defendant.

22 This result would seem to have particular
23 application in this case, when the four prospective
24 defendants have a close legal relationship with the current
25 defendant, and it appears likely that all the defendants

1 would be represented by the same attorneys.

2 THE COURT: Are all the defendants going to be
3 represented by the same attorneys here?

4 MR. CALIFANO: Your Honor, we're here today, you
5 know, representing the new defendants.

6 THE COURT: You are?

7 MR. CALIFANO: Well, we're here on their behalf,
8 objecting to the amendments.

9 THE COURT: Those are two different things.
10 You're appearing as counsel for LCOR Alexandria LLC --

11 MR. CALIFANO: Yes.

12 THE COURT: -- and PTO Holdings.

13 MR. CALIFANO: Right.

14 THE COURT: So if you're telling me that you're
15 going to be representing all reputed defendants, that's a
16 fact that --

17 MR. CALIFANO: I wholly represent the new
18 defendants, I haven't had that conversation with Mr.
19 O'Toole, but he does --

20 THE COURT: And there might be -- I mean, not to
21 make the suggestion, but there might be diversions of
22 interests among the various parties at a certain point. But
23 if you get there, I assume you'll deal with that.

24 MR. CALIFANO: If we get there, we'll deal with
25 that, Your Honor.

1 THE COURT: But the timeline that Mr. Rossman laid
2 out for 45 minutes was detailing Lehman's following the
3 trail --

4 MR. CALIFANO: Yes, Your Honor.

5 THE COURT: -- of this transaction. And I don't -
6 - and what I had expected to hear from you as a refutation
7 of that.

8 MR. CALIFANO: Well, Your Honor, I was going to,
9 but I --

10 THE COURT: Okay.

11 MR. CALIFANO: -- wanted to frame it in the
12 context of their amended complaint in their pleading,
13 because while they say -- first of all, they knew of the
14 Barclays swap back in 2009. They knew at that time in the
15 2004 discovery, because there was discovery done before.

16 THE COURT: Sure.

17 MR. CALIFANO: So they knew about the Barclays
18 swap.

19 THE COURT: Right.

20 MR. CALIFANO: They knew about those transactions.

21 THE COURT: But that's --

22 MR. CALIFANO: But subsequent --

23 THE COURT: Let's pause on that, okay. Because of
24 all the derivative transactions that come through this room,
25 this is one of the simpler ones, this is one of the simpler

1 ones. So you have something that in the absence of
2 something that frankly I can't imagine sitting here now, you
3 have a swap, the transaction that is demonstrably in the
4 money to LBSF, I know that's a shocking concept to people,
5 because Lehman quote/unquote filed, but in your pleadings
6 you also seem to suggest or feel that there's something
7 untoward or inappropriate about the non-defaulting party
8 having to pay the --

9 MR. CALIFANO: No, Your Honor, I --

10 THE COURT: -- opposing party money. So that --
11 it's a swap, it's a contract dispute, right.

12 MR. CALIFANO: And we understand that.

13 THE COURT: Right. So you've got this, you know,
14 dramatic fixed floating swap, and we have something that is
15 not at all straight forward. And there's -- I feel there's
16 this attempt being made to divert attention from the very
17 basics of the transaction.

18 For example, I asked Mr. Rossman pretty quickly,
19 is there a proof of claim, because I didn't see any mention
20 of a proof of claim. He clarified there's no proof of
21 claim. Why isn't there a proof of claim?

22 MR. CALIFANO: I don't know, Your Honor, I was not
23 at that time --

24 THE COURT: It's kind of an odd fact. Most people
25 who are owed \$6 million try to collect \$6 million, right?

1 The recoveries against the Lehman Estates are running pretty
2 well. So that's an odd fact. Okay. And when I read Title
3 18, makes me a little nervous because if what's being
4 alleged is true, whether there's a proof of claim or not,
5 it's not a good thing. It's not a good thing.

6 MR. CALIFANO: And can I explain that?

7 THE COURT: Sure. Do you know what Title 18 is?

8 MR. CALIFANO: Yes, I do.

9 THE COURT: If you read the language and conduct
10 in connection with the bankruptcy case, if the allegations
11 are, in fact, what Mr. Rossman says they are, I have a
12 concern.

13 MR. CALIFANO: Well, which allegation would that
14 be, Your Honor?

15 THE COURT: Well, the allegation that if you take
16 the allegation that there was a plain vanilla swap, we'll
17 characterize it as that. There was an event of default that
18 gave rise to a termination right, no question about it. And
19 then under the applicable ISDA there's a procedure that has
20 to be followed.

21 MR. CALIFANO: Right.

22 THE COURT: Okay. If -- and again if, if, if,
23 because I don't know, Mr. Rossman could be wrong on
24 everything that he says, if the allegations are correct,
25 there was instead of a \$42 million -- a process leading to a

1 \$42 million payment to Lehman, there was a \$6 million loss.
2 That's not, you know, a couple of million dollars swing
3 where people were getting quotes at different times in the
4 day, or people were using different costs of capital or
5 other things that might come into play when you're figuring
6 out loss.

7 So you reacted particularly negatively to the use
8 of the word conspiracy, when in the plain English meaning of
9 the word is a group of people working together to do
10 something. So if the allegations are largely correct, then
11 there was a concerted plan to take something that was in the
12 money to Lehman and have Barclays step into the shoes, and
13 on top of everything else, assert a loss.

14 It's a fact pattern of interest. I obviously have
15 no idea what's true.

16 MR. CALIFANO: Right. But that was in the
17 original complaint --

18 THE COURT: Yes.

19 MR. CALIFANO: -- Your Honor. That's what we've
20 been dealing with since that original complaint was filed.
21 We answered, we engaged in discovery. That is -- the reason
22 why I started out by saying these stories are relevant,
23 that's already in the original complaint. Okay. So those
24 issues can be dealt with there.

25 THE COURT: But the role, the specific -- the

1 particular roles of the particular individuals and the
2 particular movement of the money and arrangements could not
3 have been known simply from the close-out, the plain vanilla
4 swap closing.

5 MR. CALIFANO: If you're talking about the
6 movement of money, the transaction of Barclays in creating
7 the account of PTO, that was not --

8 THE COURT: The role of the new defendants, this
9 is squarely within the three cases that Mr. Rossman pointed
10 us to, what was not known was the role of the putative new
11 defendants in the transactions that were --

12 MR. CALIFANO: I disagree, Your Honor, and I will
13 tell you why, because these issues, the whole issue as to
14 whether the market quotations were properly received, that
15 was an issue that was dealt with in mediation, and that was
16 an issue through the beginning of this case when Weil
17 Gotshal were representing the plaintiffs. Those issues were
18 there, all those issues.

19 Mr. Gross' role was all there, Mr. O'Toole's role,
20 that was all part of the discovery, and part of the
21 mediation statements, it's in the mediation statements the
22 process.

23 So if they disputed the process, that was done
24 then. The individual's roles were done then, and it's only
25 factual because the individuals -- the corporations can only

1 act for the individuals.

2 And, Your Honor, I think if it was something that
3 was truly discovered, the complaint here just adds
4 allegations about these new defendants, and tries to
5 shoehorn them into the unjust enrichment claim.

6 So there's not a fraud claim in here, there's not
7 a civil conspiracy claim in here, this is a contract case,
8 all right. At the end of the contract, there was money owed
9 to one party in an amount to be determined, that's the
10 issue. What happened subsequent to the termination didn't
11 increase Lehman's damages at all, didn't change the nature
12 of the damages at all. This is a breach of contract case.

13 The best their allegations are, are that people
14 took an aggressive position, that's their allegation, and
15 that's all there is, Your Honor. That is all there is. I
16 mean, they've characterized it with a lot of adjectives, but
17 it still doesn't change the fact that this is a contract
18 case, Your Honor, and --

19 THE COURT: See, this is where we're not going to
20 agree. This is more than a contract case. A contract case
21 is there's an ISDA that has a close-out provision, and the
22 parties have a reasonable disagreement about what the
23 correct termination payment is.

24 This is dramatically different from a contract
25 case. This complaint alleges a series of concerted actions

1 that were designed to achieve a windfall, that's the word
2 that's used, purely, purely at Lehman's expense.

3 It was made possible by virtue of conduct of
4 various parties working together. In a normal economic
5 situation this wouldn't be the result. The notion that the
6 -- I think that you and Mr. Rossman do not agree on the
7 visibility of Lehman into what went on or around this
8 transaction. You're quite right.

9 There was a Barclays' transaction, they knew about
10 that. What they are saying in support of the motion to
11 amend, consistent with cases in this district is that what
12 they didn't understand until they had subsequent discovery
13 was the particular role that each of the individuals played
14 in the process.

15 MR. CALIFANO: And can I address something Your
16 Honor said?

17 THE COURT: Sure.

18 MR. CALIFANO: You said at Lehman's expense. What
19 occurred and nothing occurred after the termination that
20 increased or changed in the nature of their damages. There
21 was nothing done at Lehman's expense after termination, and
22 if the position is unreasonable that we've taken, then isn't
23 the -- isn't there a remedy for summary judgment, as opposed
24 to suing a number of individuals now on --

25 THE COURT: There's an allegation made that the

1 individuals involved were in the process of settling, making
2 it clear that Lehman was on a fool's errand because they
3 would never get the money. Doesn't --

4 MR. CALIFANO: And first of all, I don't see how
5 that could be the cause of an action, based on a cause of
6 action, and I do think also, Your Honor, those were
7 inappropriate, because they were in the context of
8 settlement negotiations.

9 But in settlement negotiations, isn't the
10 defendants' ability to pay always a question? Especially
11 when you're looking and talking about situations like this.
12 Defendants' ability to pay. So if somebody says in
13 settlement discussion, you can get a large judgment, but
14 you're not going to be able to enforce it.

15 THE COURT: I understand that, but this is
16 somewhat different. Because what you have here is -- and
17 it's -- you keep trying to focus me on what occurred after
18 the Barclays' transaction and --

19 MR. CALIFANO: Well, Your Honor just referenced
20 the settlement negotiations.

21 THE COURT: Well, I'm trying to focus on what
22 happened before. Because what has been alleged in the
23 complaint is that there was a plan that was implemented, it
24 was culminated in the Barclays' transaction, all right. And
25 the planning that went into that, as alleged, was a sham

1 market quotation process. And a realization that Barclays
2 would be able to step into the shoes of Lehman for a good
3 price, everyone was going to be a winner, except Lehman.

4 So the involvement of each of the newly named
5 defendants in the process that culminated in the Barclays'
6 transaction and then the funds being transferred after
7 Barclays made the payment, that's what this is about.

8 MR. CALIFANO: I understand that, Your Honor, but
9 first of all, without conceding the facts, and we're not
10 addressing them today for purposes of this motion have taken
11 as true, but even if that was the case, even if that was the
12 case, Lehman doesn't have any damages, different or
13 additional to the termination payment they may be entitled
14 to. Which is what this case is all about.

15 Now, there's no issue --

16 THE COURT: They have unjust enrichment claims.

17 MR. CALIFANO: They don't, Your Honor, but let's
18 just address the fact that there was a default. That
19 default gave LCOR the right to terminate. That's not in
20 dispute.

21 THE COURT: Yes.

22 MR. CALIFANO: Upon that termination, Lehman had
23 the rights that they had, okay, they were fixed at that
24 point, they were entitled or not entitled to obtain it on
25 that swap termination.

1 What happened before that and after that didn't
2 change the fact that their damages were fixed as of that
3 termination. They can't get additional damages, and they
4 can't get different damages.

5 The unjust enrichment claim, Your Honor, is --
6 there's no basis for that. The Barclays' monies was never
7 monies that Lehman was entitled to. Okay. And the fact
8 that they're relying on subsequent transfers, at the very
9 best, if Lehman did have a claim to that money, then that
10 claim, that unjust enrichment claim accrued when the monies
11 were transferred to PTO. Because arguably, and there's no
12 legal basis for this.

13 If they argue that they had a claim to the
14 particular Barclays' proceeds, okay, and there's no
15 allegation in the complaint of any legal entitlement to the
16 monies, then subsequent transfers don't start the clock
17 running on unjust enrichment. Once it was transferred, once
18 Lehman -- it was transferred from Lehman, which is what
19 they're saying, which we dispute, that's when the unjust
20 enrichment claim appeared.

21 The fact that they transferred money after that
22 wouldn't start the clock running again, wouldn't start a new
23 cause of action for unjust enrichment, because it wasn't
24 taken from that. Because even taking their allegations at
25 best --

1 THE COURT: So --

2 MR. CALIFANO: -- the transfer there, the unjust
3 enrichment occurred when the money is put in PTO.

4 THE COURT: Is the money still in PTO?

5 MR. CALIFANO: The money is still in PTO and we
6 showed them that recently. I mean, we haven't given them a
7 daily balance, but I mean, the statement that he doesn't
8 know, we gave them the statement, where it is right now.
9 And they have an unjust --

10 THE COURT: But then let me try and take you down
11 a different path. So if that's true, right, and in essence
12 what you're saying is, don't worry about all these other
13 guys, because the money's still in PTO, we're good for it.

14 MR. CALIFANO: No, what I'm saying is, Your Honor,
15 their claim that --

16 THE COURT: I'm not --

17 MR. CALIFANO: That they went after all the other
18 defendants because they thought the PTO money was gone, well
19 --

20 THE COURT: Well, I'm asking you a direct
21 question. If you're telling me that the, what we'll call
22 the Barclays' money is still in PTO, right --

23 MR. CALIFANO: Yes.

24 THE COURT: -- then if this is, in fact, a plain
25 contract dispute, then why don't we just very quickly

1 determine liability on the close-out of the swap?

2 MR. CALIFANO: Sure, we could do that, Your Honor,
3 and then we don't need to bring in all these causes of
4 action.

5 THE COURT: Well, put that to one side. Lehman's
6 made an allegation that, you know, based on what you say,
7 arithmetic that the swap was \$42 million in the money to
8 LBSF. It's a simple swap. It's a simple swap, right? So -
9 - but where you're going with it is, you're going to, I
10 believe, attempt to establish that the market quotation
11 process was real, that there were no market quotes.

12 MR. CALIFANO: Yes, yes, Your Honor.

13 THE COURT: And you have had a loss?

14 MR. CALIFANO: Yes.

15 THE COURT: How could you have a loss if you made
16 \$15 million? How could you have a loss if you made \$15
17 million? I don't understand that.

18 MR. CALIFANO: But it's not the issue for today.
19 It's not the issue for today.

20 THE COURT: You have a very, very narrow view of
21 what the issue is for today, and I have a much broader view
22 of what this is for today.

23 MR. CALIFANO: Well, I'm here on this motion to
24 amend, Your Honor.

25 THE COURT: All right. But your entire argument

1 has not been on a motion to amend. Your entire argument has
2 been on a motion to dismiss, I think.

3 MR. CALIFANO: Yes, because we are responding to
4 their motion to amend with the argument of futility, which
5 is a 12(b)(6) standard as the cases say.

6 And I think the original complaint had this unjust
7 enrichment claim, it had an unjust enrichment claim against
8 PTO. If they believe that there is a valid unjust
9 enrichment claim they're protected there. If there were
10 transfers, if they were able to get a judgment and they were
11 transferred, they have all those remedies. It's not the
12 basis --

13 THE COURT: What do you mean they have all those
14 remedies?

15 MR. CALIFANO: If they get a judgment, right, and
16 then they see transfers, if fraudulent conveyance, and they
17 can raise the fraudulent conveyance theory if they believe
18 the money was transferred, they don't have to sue
19 individuals at this point. Suing individuals, in addition
20 to Mr. Gross and Mr. O'Toole where they do allege
21 (indiscernible) receipts, they sue a number of other
22 entities without even the basis -- without having the
23 various allegation that a payment was received by them.

24 THE COURT: Well, the monies you just told me were
25 in the PTO account, so PTO is directly or indirectly held by

1 two of the other defendants, right?

2 MR. CALIFANO: So you can't -- you have to have --
3 you can't just sue the corporate parents without any
4 allegations, they have no passing allegations, they have no
5 allegations that the corporate parents were involved at all,
6 and related by the way, is not in the corporate chain at
7 all. Not in the ownership chain at all.

8 But you can't just add them because they're in the
9 chain, you know, in the corporate ownership chain. And
10 there's not a single allegation against those entities.

11 THE COURT: When you say those entities, which two
12 entities?

13 MR. CALIFANO: There's not a single allegation
14 against Rosegreen or related. Other than the fact that they
15 may have received. But they know, they know where all the
16 funds are. They know where all the PTO funds are. They can
17 do the math. We've given them account statements, and they
18 referenced a \$200,000 payment and a \$185,000 payment.

19 THE COURT: Okay. Why don't you let me hear from
20 Mr. Rossman again.

21 MR. ROSSMAN: Unless Your Honor has questions,
22 I'll be super brief. I hope the money's there, okay, we
23 don't have a current account statement, I'd like to, I'd
24 like to get a confirm that it's there and will be there.
25 Here's among other things that we know --

1 THE COURT: So you want more than \$15 million,
2 though, right?

3 MR. ROSSMAN: Your Honor, we do, and we want to
4 have the -- we want to be able to collect, because we think
5 damages exceed that. But we don't -- certainly the full
6 15.64 million that was received from Barclays, our
7 understanding is that's not at PTO Holdings anymore, because
8 there have been distributions.

9 Related received \$275,000 on December 15th, 2008.
10 Mr. O'Toole received \$185,000.

11 THE COURT: Gross, is it Gross?

12 MR. ROSSMAN: Mr. Gross, BWRA received 200,000 in
13 2010 in the settlement that I mentioned, he'd received
14 20,000 back in December 29 of 2008, and a million dollars
15 was distributed to investors, including \$652,500 to an
16 entity called Related GSA LLC. Which has --

17 THE COURT: And what about the Rosegreen Trust?

18 MR. ROSSMAN: I'm sorry, Your Honor?

19 THE COURT: The Rosegreen Trust.

20 MR. ROSSMAN: The Rosegreen Trust, we don't --
21 pardon me one second, Your Honor.

22 MR. CALIFANO: Your Honor, if I may.

23 THE COURT: Yeah.

24 MR. CALIFANO: I just want to note that not one of
25 these allegations are in the complaint. So I don't know if

1 he's amending his complaint right now.

2 MR. ROSSMAN: No.

3 MR. CALIFANO: But these allegations aren't in the
4 complaint.

5 MR. ROSSMAN: Your Honor, we don't know whether
6 there's been a specific transfer to Rosegreen or not. What
7 we do understand from the documents that were produced in
8 October of 2014 is that Mr. Gross and BWRA believed that
9 they were working for Rosegreen, and I've got -- you know,
10 got documents to show it, Your Honor.

11 I'm looking at a letter that was sent from Mr.
12 Gross' counsel at Ropes and Gray who's bragging about, you
13 know, the value of the work that BWRA had done exceeding all
14 expectations for a favorable result for Rosegreen.

15 So, you know, Your Honor, we don't know precisely
16 where all this went. We made a game effort in the
17 complaint, frankly a lot of elbow grease that went into it,
18 to identify it as best we could. We were led astray in
19 terms of where the money is. We don't have confirmation
20 where the money all went, and we do have claims and
21 potential damages that greatly exceed the \$15 million.

22 So I think the idea, you know, I'm fond of Your
23 Honor's idea of running to a quick resolution of the value
24 of the underlying swap against the counterparty and that's
25 certainly we'd love to explore but we think we've got, you

1 know, damages that gone beyond that and want --

2 THE COURT: So --

3 MR. ROSSMAN: And the time for that is after the
4 amendment when we sort it all out in discovery and --

5 THE COURT: Well, I'm just trying to figure out
6 the best way to approach this. Because to the extent that,
7 Mr. Califano, you're going to be representing everybody,
8 right, then the facts are what the facts are with respect to
9 the close-out.

10 MR. CALIFANO: Yes.

11 THE COURT: Right? So we could, and I am going to
12 allow the amendment. I think that the standing question is
13 interesting, but I don't think I even have to deal with it,
14 because I think that the claims all relate back. And to the
15 extent that there is a sense that some of -- that there may
16 be some futility, I can take that up on motions to dismiss.
17 But I'm going to allow the amendment.

18 What I would like to do is focus more on how we
19 keep this from escalating into more of a drama than it
20 already is, because I'm not a huge fan of drama.

21 So I'd like to go back to the notion that it's a
22 simple contract dispute, and that will be what it will be,
23 and it really, you know, all of the allegations that Mr.
24 Rossman has pointed out to in the complaint may come into
25 play, particularly -- forget about, you know, payments and

1 settlements around payments, just focusing on the close-out
2 process, market quotations, et cetera, we're going to have
3 to get to the bottom of that.

4 So, you know, thinking out loud here, we could
5 fast track to a liability determination on the close-out,
6 and everybody's rights could be reserved in terms of whether
7 they, you know, ultimately have a right to be dismissed out,
8 you know, on any and all other grounds. But --

9 MR. CALIFANO: The only issue is, Your Honor, that
10 we've not received discovery from Lehman.

11 THE COURT: I'm sorry?

12 MR. CALIFANO: We have not received discovery. We
13 have outstanding discovery from Lehman.

14 THE COURT: Okay.

15 MR. CALIFANO: We have significant outstanding
16 discovery, so that needs to be factored into it.

17 THE COURT: Sure.

18 MR. ROSSMAN: I don't think we're (indiscernible)
19 discovery either, Your Honor, but we're happy to provide.

20 THE COURT: Yeah, although I don't -- I just out
21 of curiosity, given that under the ISDA, it's the
22 counterparties obligation here, I'm just wondering what
23 exactly is the discovery that you expect to get from Lehman.

24 MR. CALIFANO: Well, we've had outstanding
25 requests for a significant period of time, so. And we

1 haven't had a response to those requests.

2 THE COURT: Do you know, Mr. Rossman, what they
3 are?

4 MR. ROSSMAN: I don't know off hand, Your Honor.

5 THE COURT: Okay.

6 MR. ROSSMAN: We've not even had a meet and confer
7 on that.

8 THE COURT: Okay.

9 MR. ROSSMAN: We'll have to do that.

10 THE COURT: Well, perhaps you should do that,
11 because in the usual situation where it's the -- you know,
12 here in particular, where you have the premise of the loss,
13 going to loss under the ISDA is the failure of the quotation
14 process, that would have virtually nothing to do with
15 Lehman, you know, around the termination of this particular
16 ISDA. But, you know, you can have a meet and confer, and if
17 there's discovery that they're fairly entitled to, you ought
18 to give it to them, and we should, you know, we should go
19 from there.

20 But I'm with you in terms of keeping this to the,
21 you know, contract dispute that it is. But I think that
22 it's appropriate to amend the complaint, bring everybody in
23 as defendants who there have been allegations against, I
24 think their roles were not fully understood. And as time
25 goes on, their roles may be fully more understood, and there

1 may be motion practice and all of your rights are fully
2 reserved in that regard.

3 MR. CALIFANO: Yeah, I would anticipate, Your
4 Honor, that they -- well, we'll see what the second amended
5 complaint looks like, but I would anticipate that there's
6 significant legal deficiencies.

7 MR. ROSSMAN: Well, you know, what the second
8 amended complaint, you know, everyone knows what that looks
9 like, we'll file it with Your Honor's permission. We'll
10 meet and confer with them on discovery including our own --

11 THE COURT: But I want to be --

12 MR. ROSSMAN: -- need for discovery --

13 THE COURT: I want to be clear.

14 MR. ROSSMAN: -- and proceed as quickly as we can.

15 THE COURT: You have whatever rights you have
16 under the federal rules to file whatever motions you believe
17 you can. But in terms of my overall management of the case,
18 I'm not going to entertain dispositions on multiple motions
19 to dismiss and keep everything else in abeyance.

20 MR. ROSSMAN: I understand.

21 THE COURT: We're going to run down parallel
22 tracks. All right?

23 MR. CALIFANO: Thank you, Your Honor.

24 THE COURT: Okay. Thank you very much.

25 MR. ROSSMAN: Thank you, Your Honor.

1 THE COURT: Will you send us an order please, and
2 would you send it by Mr. Califano first?

3 MR. ROSSMAN: I will, Your Honor.

4 THE COURT: Thank you.

5 (Proceedings concluded at 3:22 PM)

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RULINGS

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CDO 2002-1 LTD., Putnam Structured Product CDO 2002-1
LLC, U.S. Bank National Association, as Successor
Trustee, Lehman Brothers Special Financing Inc., and
Lehman Brothers Holdings Inc.

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08-13555 - Doc# 50296 Motion for Entry of an Order
Authorizing Lehman Brothers Special Financing Inc.
to Invest Disputed Claim Reserves for Claim Numbers
67733 Pursuant to Section 8.4 of the Modified Third
Amended Joint Chapter Plan of Lehman Brothers
Holdings Inc. and its Affiliated Debtors

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Adv. 08-01420 - Doc# 12478 Trustees Motion for an
Order to (I) Establish a Third Interim Distribution
Fund for General Unsecured Creditor Claims, (II)
Release Reserves from the Secured and Priority Claim
Reserve, the First Interim Distribution Fund, and the
Second Interim Distribution Fund, and (III) Make a
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C E R T I F I C A T I O N

We, Dawn South and Sheila G. Orms, certify that the
foregoing transcript is a true and accurate record of the
proceedings.

Dawn South

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